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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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JAMES CURTIS McCRAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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PETITION FOR WRIT OR CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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## QUESTION PRESENTED

I. Whether Florida's death penalty statute which allows the trial judge to impose the death sentence in a capital case over a jury recommendation of life imprisonment violates the Fifth, Sixth, Eight, and Fourteenth Amendments of the Constitution of the United States.

II. Whether the failure of the Florida Supreme Court to decide Petitioner's direct appeal for more than five and one half years after the filing of briefs and oral argument constitutes a denial of Petitioner's Constitutional rights under the Eighth and Fourteenth Amendment.

No.

IN THE

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October Term, 1980

---

JAMES CURTIS McCRAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

---

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Florida.

## CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, McCray v. State, case number 45,894 October 30, 1980, rehearing denied April 9, 1981.

## JURISDICTION

The judgment of the Supreme Court of Florida was entered on October 30, 1980 and rehearing was denied on April 9, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), petitioner having asserted below and asserting here deprivations of rights secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the statutes of Florida:

§921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty. -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. -- after hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these consideration, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance the s. 775.082.

(4) Review of judgment and sentence.-- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty(30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat or violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharge of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.-- Mitigating circumstances shall be the following:

(a) The defendant has not significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

## STATEMENT OF THE CASE

In this petition references to the record on appeal as indexed in the Florida courts will be indicated by use of the symbol "R" followed by the number of the page on which the cited material appears.

Petitioner was indicted for two counts of first degree murder under Florida Statute §782.04. (One count was for felony - murder during the commission of a rape).

Defendant motions for orders determining the defendant to be insane were denied (R. 1020). The case came on for jury trial in Lee

County (Ft. Myers) Florida. The jury returned a verdict of guilty on count two of the indictment (felony-murder). Thereafter, a second trial on sentencing was held. The jury returned its advisory verdict recommending life imprisonment; not execution. The trial judge entered a written order rejecting the jury's advisory verdict and imposing the death penalty (R. 1090-1095).

Pursuant to Florida Statute §924.08 (1973) petitioner took a direct appeal to the Florida Supreme Court. Petitioners main brief was filed in The Florida Supreme Court on or about October 20, 1974. Oral argument before the Florida Supreme Court was had on March 5, 1975. Based upon the sua sponte order of the Florida Supreme Court the case was re-argued on September 20, 1977.

In his main brief petitioner raised the questions of the constitutionality of Florida's procedure allowing overruling of the jury's sentencing verdict by the trial judge.

After this Courts decision in Gardner v. Florida, 430 U.S. 349 (1977) the Florida Supreme Court entered an order dated June 17, 1977 directing the then retired trial judge to file a response with the court stating whether he had imposed the death penalty in consideration of any information not known to the petitioner. (Appendix B )

The judge, William Lamar Rose filed his statement on or about July 11, 1977 denying that he considered any information not known to the appellant and his counsel. (Appendix B )

On August 4, 1977, petitioners counsel wrote to Judge Rose, enclosing a newspaper article which quoted the judge as saying he was influenced to sentence petitioner to death because he felt the sentence would never be carried out. Petitioners counsel asked Judge Rose to respond to the Florida Supreme Court and advise if he made the statement attributed to him by the newspaper article. Judge Rose never responded. Petitioners counsel obtained an affidavit from the newspaper reporter attributing the statements to Judge Rose. On September 9, 1977 petitioner filed a reply brief in the Florida

Supreme Court raising the argument that the death sentence was illegal under Gardner v. Florida, supra, because the judge considered his own political views and predictions concerning the sentence. (Appendix B )

On August 18, 1978 petitioner filed a motion in the Florida Supreme Court to have his appeal determined. Petitioner pointed out that his appeal had been pending for three and one-half years without a decision. By order dated September 7, 1978 this motion was denied without explanation. (Appendix C )

In late 1977 petitioners counsel was informed by family members of the petitioner that a material witness at trial, Otis Walker, had admitted he lied in his testimony at petitioners trial. Walker was the only eyewitness who positively identified the petitioner as being in the vicinity of the crime near the time it was committed. Walker prepared and forwarded an affidavit to this effect. Based on the affidavit petitioner filed a motion for new trial in the Florida Supreme Court and the trial court. (Appendix D ) The Supreme Court entered an order on November 29, 1978 denying the new trial motion for being untimely and improperly filed, granted petitioner leave to file a motion to vacate judgment and sentence under Rule 3.850 Florida Rules of Criminal Procedure (raising the same grounds) and remanded the cause to the trial court to entertain this motion. (Appendix D ) Evidentiary hearings were held before the trial court on January 18, 1979 and February 1, 1979. The motion was denied by the trial court February 2, 1979. (Appendix D) Petitioner took a direct appeal of this order to the Florida Supreme Court.

Petitioner's brief in that appeal was filed on or about September 9, 1977.

On October 30, 1980 the Florida Supreme Court affirmed the judgment of conviction and sentence in a 16 page per curiam opinion. (Appendix A) In the opinion the court noted that Petitioner filed a notice of appeal from the order denying post-conviction relief but stated petitioner "...has not informed this Court of

the grounds of his attack." (Appendix A)

Petitioner filed a motion for rehearing on December 1, 1980. By order dated April 9, 1981 the court stated that petitioner's brief was not made available to the court through "inadvertance". The per curiam order continued to state the brief was reviewed on re-hearing and ruled that petitioners claims were without merit and therefore denied. (Appendix A).

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On appeal to the Florida Supreme Court and on rehearing the issues concerning the constitutionality of the statutes and their application to this case in overruling the jury's verdict for life imprisonment were raised. The Florida Supreme Court ruled against petitioner on all of these claims. (Appendix A, I).

## REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF A DEATH SENTENCE CONTRARY TO A JURY PENALTY VERDICT OF LIFE IMPRISONMENT VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, THE JURY TRIAL CLAUSE OF THE SIXTH AMENDMENT, THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This case concerns the narrow aspect of Florida's capital punishment scheme which permits the trial judge to impose a death sentence notwithstanding the jury's penalty verdict of life imprisonment based on statutory findings of fact. There are thirty-four persons now under sentence of death in Florida (out of a total Florida Death Row population of 155) who would be directly affected if Petitioner were to prevail. 1/ To petitioner's best knowledge, Florida is the only American jurisdiction where prisoners are under sentences of death after jury decision for life, although Indiana law would in theory seem to permit such an outcome. 2/

Petitioner urges that this Court grant certiorari because the infliction of death by the sovereign contrary to the decision of its own citizens throws into doubt not merely specific guarantees of the Bill of Rights, but seven centuries of jury inviolability under our Anglo-American system of jurisprudence and two centruies of representative advice and consent for extraordinary uses of government power under our United States Constitution.

Although this Court has considered various aspects of Florida's death penalty system, it has never focused squarely on the special and critical issue now before it.

In Proffitt v. Florida, 428 U.S. 242, 252, (1976), this Court upheld the overall Florida scheme and noted that particapation in penalty determination by the trial judge as well as

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1. There are six prisoners under death sentences after jury life verdicts which have been affirmed by the Florida Supreme Court, and 28 others with such sentences pending before the Court. See also Appendices E and F.

2. See appendix G for a listing of current federal and state death penalty statutes.

the jury might promote more accurate fact finding. However, as respondent Florida itself emphasized [3] , that case involved a death sentence imposed by the trial judge with the concurrence of the jury.

In Dobbert v. Florida, 432 U.S. 282 (1977), petitioner was in fact sentenced to death notwithstanding a jury verdict of life imprisonment, but claimed only that his punishment under a statute enacted after the date of the crime violated the Ex Post Facto and Equal Protection Clauses. See id. at 432 U.S. 304, n. 1 (Stevens, J., dissenting):

> The atrocious character of this individual's crimes ...is of course no more relevant to the legal issue than the fact that 10 of the 12 jurors who heard all of the evidence voted to spare his life.

It is axiomatic that this Court does not resolve issues not raised on certiorari, see e.g. Mazer v. Stein, 347 U.S. 201, 208 and n. 6 (1954). However, Petitioner feels it important to show why Proffitt and Dobbert not only do not control the outcome of this case, but should not control.

Perhaps most crucially, in neither Proffitt nor Dobbert did this Court have the opportunity to measure Florida's provision for overriding jury life determinations against the overwhelming consensus of the States to the contrary both before and after the landmark decision of Furman v. Georgia, 408 U.S. 238 (1972). Since at that time (1976-1977) many jurisdiction were just reenacting death penalty statutes, no clear pattern of post-Furman legislative practice was then evident. In 1981, that pattern is clear and overwhelming.

Further, neither Profitt nor Dobbert explored the evolution and current performance of the jury's function in capital penalty determination. In Duncan v. Louisiana, 391 U.S. 145, 154-155 (1968), this Court rejected dicta holding that jury trial did not apply to the States, stressing that such dicta were not based

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3. See Profitt, supra, O.T., 1975, No. 5706, Brief for Respondent at 78: "In this particular case, we are not confronted with an overriding of a recommendation of mercy, but rather unanimity as between the jury and the trial judge in concluding that death was the appropriate sentence."

on careful inquiry in the jury's role in our system of law. This Court now has the opportunity to conduct the inquiry demanded by Duncan before a death sentence is carried out against the will of a jury.

Since Proffitt and Dobbert, this Court has also developed a more secure framework of death penalty law by which to test the overruling of a jury life decision against "evolving standards of procedural fairness". Gardner v. Florida, 430 U.S. 349, 357 (1977). 4/

Further, this case may assist the Court in clarifying two continuing problems of double jeopardy law: defining an "acquittal," and drawing the line where the Constitution may prohibit legislative treatment of decisions for the accused as merely "advisory" or appealable. 5/

Petitioner stresses that his success would not significantly disturb the scheme approved in Proffitt, since under Florida law a sustained and sustainable death sentence after a jury life decision is the rare exception. 6/

Nor would petitioner's success upset Florida's overall policy of judicial capital sentencing with an advisory jury as analyzed in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). 7/ In United States v. Jackson, 390 U.S. 570, 575-576 (1968), this Court noted that a scheme such as Florida's but with a jury decision against death final "would conform to the long tradition that makes the trial judge...the arbiter of the sentence" while treating the jury's role as "merely advisory".

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4. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977), Lockett v. Ohio, 438 U.S. 586 (1978), Presnell v. Georgia, 439 U.S. 14 (1978), Godfrey v. Georgia, ___, U.S. ___, 100 S.Ct. 1759 (1980) and Beck v. Alabama, ___U.S. ___. 100 S.Ct. 2382 (1980).

5. See, e.g., Burks v. United States, and companion cases, 437 U.S. 1 (1978), Swisher v. Brady, 438 U.S. 204 (1978), United States v. Difrancesco, ___U.S. ___, 66 L.Ed. 2d 328 (1980), and Bullington v. Missouri, No. 79-6740 (decision pending).

6. See Proffitt, supra, 428 U.S. at 248-250, and Dobbert, supra, 432 U.S. at 295-296.

7. Notably, the authoritative constuction of Dixon stresses the trial judge's power to reduce an excessive jury verdict for death, see id. at 8, but makes no specific mention of the power to override a jury verdict for life.

Since petitioner's important claims have never been squarely addressed by the Court, and are of vital importance to our scheme of ordered liberty as it governs the choice for life or death, the Court should grant certiorari on the merits.

II. THE FAILURE OF THE FLORIDA SUPREME COURT TO DECIDE PETITIONER'S DIRECT APPEAL FOR MORE THAN FIVE AND ONE HALF YEARS AFTER THE FILING OF BRIEFS AND ORAL ARGUMENT CONSTITUTES A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENT.

This Court should grant certiorari to define reasonable time limits within which a state appellate court must adjudicate and appeal in a capital case.

A. The Impositions of Death After A Jury Decision For Life Is Contrary To The Near-Unanimous Consensus Of The States And The Great Weight Of Professional Legal Opinion, Raising Grave Questions Of Constitutionality Under The Sixth, Eighth and Fourteenth Amendments.

At the onset Florida's practice of overruling jury life decisions must be placed in a perspective of national experience and history. At no time in the past 30 years have more than three States allowed death sentences after jury decisions for life.

This Court has consistently looked to objective indicators, chiefly the existing laws and practices of the Nation, in testing jury practices under the Sixth Amendment [8] and death penalty procedures under the Eighth Amentment.[9]

In 1948, only New York, Delaware and Utah sanctioned this practice out of 42 jurisdictions (including federal) with discretionary capital punishment for murder.[10] By the time of Furman (1972) only Delaware and Utah permitted such a procedure out of 41 capital murder jurisdictions (including federal and District of Columbia)[11], New York having made a mercy decision by either the judge or the jury binding in 1963.[12]

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8. See, e.g., Duncan, Supra, 391 U.S. at 161, Baldwin v. New York, 399 U.S. 66, 70-72 (1970), and Burch v. Louisiana, 441 U.S. 130, 138 (1979).

9. See, e.g., Roberts v. Louisiana, 428 U.S. 325,336 (1976) (mandatory death sentence), Coker v. Georgia, 433 U.S. 584, 593-597 (1977) (death penalty for rape of adult) and Beck v. Alabama, ___U.S. ___, ___, 100 S.Ct. 2382,2388 (1980) (Prohibition of lesser offense instruction in capital case).

10. See Andres v. United States, 333 U.S. 740, 767 (1948) (Frankfurter, J., concurring). Inadvertantly, Justice Frankfurter listed New York as binding and New Mexico as nonbinding, but see New Mexico Acts of 1939, Ch. 49 (jury recommendation of life imprisonment in capital case binding).

11. See Witherspoon v. Illinois, 391 U.S. 510, 525-527 and nn. 2-8 (1968) (Douglas, J., concurring). Both Utah and Delaware now make life imprisonment automatic unless the jury unanimously agrees on death. (See Appendix G).

12. See People v. Fitzpatrick, 308 N.Y. S.2d 18, 22 (1970).

Since the decision in Furman, of jurisdictions (including federal) which have adopted "guided discretion" death penalty statutes with jury participation in the penalty phrase, only Florida and Indiana permit death sentences after jury decisions for life (see Appendix G). Moreover, only in Florida does it appear that such death sentences actually have been imposed since Furman.

An additional indicator of unconstitutionality under the Eighth Amendment is the great rarity with which death sentences after jury mercy recommendations were actually imposed and executed under the pre-Furman Utah and New York laws[13/] (There were no executions in Delaware after 1949).

All seven Utah executions during the period 1948-1972 involved cases where the jury had refused to recommend life imprisonment; in two other cases death sentences were affirmed by the Utah Supreme Court after jury life recommendations, but the defendants received executive clemency (see Appendix H for Utah cases).

Knowledgable commentators have also stated that under the pre-1963 New York law, trial judges almost "invariably" followed jury recommendations of mercy. See Togman, The Two-Trial System in Capital Cases, 39 N.Y.U.L. Rev. 50, 75 n. 171 (1964), citing New York State District Attorney's Association, Memorandum and Draft Bill (October 17, 1960). In Williams v. New York, 337 U.S. 241 (1949), this Court affirmed a death sentence imposed despite a recommendation for life; but the defendant, Samual Titto Williams, received executive clemency, based in part on the jury's recommendation.[14/] See Message of the Governor of New York,

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13. For emphasis on actual frequency of imposition of the death penalty as an index of community standards under the Eighth Amendment, see Furman, supra, and Lockett, supra, 438 U.S. at 624-626 (White, J., concurring in part).

14. [Petitioner does not challenge the holding in Williams, which remains good law, see United States v. Grayson, 438 U.S. 41 (1978).]

November 16, 1949, N.Y. Leg. Doc. (1950) No. 10, pp. 13-14, quoted in Michael and Wechsler, Criminal Law and Its Administration (1956 supp.) 55.

This near-uniform consensus of the States that jury decisions against the death penalty should be final is in accord with professional legal opinion, another factor this Court has considered in both Sixth and Eighth Amendment decisions. [See, e.g., Duncan, supra, 391 U.S. at 156-157, and Gregg v. Georgia, 428 U.S. 153, 189-195 (1976).] Thus a major study endorsed by this Court found a reasonable basis for judge/jury disagreements in capital penalty decisions. [Kalven and Zeisel, The American Jury 445 (1966), cited in Duncan, supra, 391 U.S. at 157 and nn. 24 and 26.] The Court itself has praised the great reluctance of juries to impose death. [See Gregg, supra, 428 U.S. at 181-182; Furman, supra, 408 U.S. at 387-389 and 402 (Burger, C.J., dissenting).]

Severe critics of noncapital jury sentencing have advocated the jury's power to reject the death penalty. See, e.g., Note, Jury Sentencing in Virginia, 53 Virg. L. Rev. 968, 969 (1967), Rubin, The Law of Criminal Correction 325 (1963), Lafont, Assessment of Punishment -- A judge or Jury Function?, 38 Texas L. Rev. 834, 838 (1960), and Report of the Royal Commission on Capital Punishment, 1949-1953, Paragraph 571. This vital distinction was stressed by both professional sources cited in Proffitt, supra, 428 U.S. at 252 n. 10. See American Bar Association Project on Standards for Criminal Justice, Sentencing Alternative and Procedures, Section 1.1, Commentary (Approved Draft 1968) at 47-48 (strong reasons for requiring jury consent for death penalty) and President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in Free Society, Task Force Report, The Courts 26 (capital jury discretion generally accepted, but noncapital jury sentencing undesirable).

Especially relevant here are several authorities, including the American Law Institute Model Penal Code, which endorse

Florida's general scheme of judicial capital sentencing with an advisory jury, but stress finality for a jury determination of life. See American Law Institute, Model Penal Code Section 210.6 and Commentary at 133 (P.O.D. 1962), Togman, supra, 39 N.Y.L. Rev. 50, 53, Wollan, The Death Penalty After Furman, 1974 Criminal Justice Systems Rev. 213, 230, Symposium on Capital Punishment, 7 N.Y.L. Forum 249, 312-313 (1961) (Opinion of Prof. Louis B. Schwartz) and Comment, Jury Discretion and the Unitary Trial Procedure in Capital Cases, 26 Ark. L. Rev. 33, 52-53 (1972).

This Court should grant certiorari to measure the procedure by which petitioner was sentenced to death against these objective and manifest indexes of unconstitutionality.

B. Florida's Practice, As Interpreted By The Highest State Court In Petitioner's Case, Is Based On The Mistaken Notion That A Final Jury Decision For Life Would Violate The Federal Constitution, Indicating Violation Of The Eighth And Fourteenth Amendments.

As stated in Lockett v. Ohio, 438 U.S. 586, 602 (1978) the States "deserve clearest guidance" in interpreting Furman and subsequent death penalty cases. This Court should grant certiorari to clarify the Florida Supreme Court's notion that jury life determinations cannot be final, because their finality would violate Furman. This misunderstanding not only places the validity of Petitioner's sentence in doubt, but effectively chills the possibility for legislative change.

This Court has consistently rejected death penalty procedures premised on the misconception that Furman prohibited the "arbitrary" granting of mercy rather than the arbitrary infliction of death.[15/] The overruling of jury life decisions in Florida was

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15. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 298-299 (1976) (mandatory death sentence), Lockett, supra, 438 U.S. at 599-600 and nn. 7-8 (restriction of mitigating factors in capital case) and Beck, supra, at ____ U.S. ____ n. 7 and _____-_____, 100 S.Ct. at 2386 n. 7 and 2390-2392 (prohibition of lesser offense instructions in capital case).

was apparently conceived and is certainly now administered under such a misconception.

At the time of Furman, Florida had just amended its 1872 law, which permitted the majority of a jury to grant mercy in capital cases, providing for a separate penalty trial with suggestive standards (Laws of Florida, 1972, Ch. 72-72). After Furman a prominent Florida prosecutor advocated a scheme similar to the Model Penal Code, with an advisory jury's verdict of life final, and the Florida Senate passed such a law.[16/] However, the Governor had advocated exclusion of the jury from the penalty phase for fear of violating Furman[17/], and the Attorney General had expressed similar fears.[18/] Thus the provision in Florida's post-Furman law for death sentences after jury life verdicts can clearly be viewed as an aberration intended to comply with Furman rather than a free legislative judgment that jury life decisions should not be final. National practice before and after Furman supports this view.

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16. See Letter by Chief Assistance State Attorney Harry L. Shorstein of September 6, 1972, in A Final Report of The Governors Committee To Study Capital Punishment 69, 70 (1972 and Journal of the House of Representative, November 30, 1972 at 41 (Senate's adopted version of Section 921.141 (4), making jury's failure to recommend death final).

17. See Ehrhardt and Levinson, Florida's Legislative Response to Furman: An Exercise in Futility?, 64 J. of Criminal L. and Criminology 10, 13-15 (1973).

18. See Hearings, Select Committee on the Death Penalty, Florida House of Representatives at 20-21 (August 9, 1972) (view of Attorney General that jury discretion with standards still risked violation of Furman).

In Douglas v. State, 373 So.2d 894, 897 (Fla. 1979), in deciding a challenge based on double jeopardy, the court itself confirmed this view when it held that prohibiting death sentences after jury life determinations would "place our statute in contravention of the directives of the United States Supreme Court". (Emphasis supplied.) Id., the Court stated that its understanding of Furman was "perhaps more important" than any other consideration in rejecting for the first time a constitutional challenge to the overriding of life verdicts.

In Johnson v. State, 393 So.2d 1069 at 1074 (Fla. 1980), the court specifically confirmed and restated its position in Douglas:

> [A]cceptance of defendant's assertion would place our present death penalty statute in contravention of the United States Supreme Court's directive in Furman..., since to accept his argument would mean that a trial judge and this Court would be bound by the jury's recommendation of life. (Emphasis supplied.)

Of course this view is erroneous, see Gregg v. Georgia, 428 U.S. 153, 203 (1976) ("the isolated decision of a jury to afford mercy" does not invalidate system with adequate safeguards against arbitrary inflication of death). Petitioner stresses that in Johnson v. State, supra, the Florida Supreme Court was briefed and the petitioner briefed the Florida Supreme Court in his motion for rehearing (Appendix I.) on the overwhelming consensus of the States for final jury life determinations, see Douglas v. State, supra. Thus the court's misinterpretation of Furman is now a settled point in State law which cries out for clarification. Also of note, the High Courts of three states have sustained schemes where a jury life decision is binding but the trial judge is free to reduce a verdict of death--the precise result which the Florida Court has declared contrary to Furman.[19/] Thus Florida law on this point is not only in con-

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19. See People v. Frierson, 25 Cal. 3rd 142, 177, 599 P.2d 587 607-608 (Cal. 1979), Collins v. State, 548 S.W. 2d 106, 112 (Ark. 1977) (trial judge's power to reduce verdict of death promotes interests of Furman) and Smith v. Commonwealth, 248 S.E. 2d 135, 145-146 (Va. 1978).

flict with the near-uniform practice of the Nation, but is based on the assumption that the Cruel and Unusual Punishment Clause forbids deference to a jury's decision to spare life.

This Court has not hesitated to review and cure similar aberrations stemming from Furman. See nn. 9 and 15, above. Both the responsibilities of this Court as stated by the Chief Justice in Lockett, and the value of a human life which the conscience of the community has voted to spare, call for the granting of certiorari in this case.

C. Florida's Policy Of Overturning Jury Life Decisions Merely In Order To Avoid Isolated "Errors" For Mercy Violates The Sixth And Fourteenth Amendment Values Held Applicable To Capital Penalty Juries In Witherspoon v. Illinois, 391 U.S. 510 (1968).

Although this Court has not to date required jury participation in capital penalty determination[20] , it has demanded that any jury involved in deciding life or death must comport with the same basic Sixth and Fourteenth Amendment values as a jury trying the issue of guilt. Witherspoon v. Illinois, 391 U.S. 510, 518 (1968). Whereas Illinois deprived the jury of its representative nature by broad death-qualification of venirepersons, Florida strips the jury of a yet more fundamental attribute: the power to bind for the accused. By extending application of the Sixth Amendment to capital penalty juries, even though such juries may not themselves be required, Witherspoon is in accord with earlier cases which enforced "established tradition in the use of juries" at a time when the States were presumed free to dispense with jury trial altogether, see Smith v. Texas, 311 U.S. 128 (1940) at 130, and Turner v. Louisiana, 379 U.S. 466, 471-473 (1965).

Petitioner stresses that the issue on which he seeks review is not whether Florida law defines a jury's life decision as "merely advisory", but whether this definition is consistent with the Sixth Amendment values protected by Witherspoon.

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20. Question reserved in Lockett, supra, 438 U.S. at 609 n. 16.

The most absolute English monarch might intimidate, imprison, or attaint a recalcitrant jury--but could not reverse its verdict for the accused. See Powell, Jury Trial of Crimes, 23 Washington and Lee L. Rev. 1, especially 2-3 and n. 4 (1966). May Florida now exercise this power to impose a penalty whose very controversy was at the heart of Witherspoon's demand for a representative panel? Se id. at 519-521.

As declared in Duncan, supra, 391 U.S. at 156-157, the jury's prime purpose, "to prevent oppression by the Government", may be especially served when the panel reaches a different result than the judge--and this purpose is utterly eviscerated if the Government may overturn a jury's decision in favor of innocence or life.[21]

Under Florida law, the practice of overriding jury life verdicts is based not on the premise that juries are incapable of making intelligent penalty decisions [22], but solely on the fear that in isolated cases juries will "unreasonably" reject death. See Chambers v. State, 339 So.2d 204, 208-209 (Fla. 1976) (England, J., concurring) (override of life verdict is to prevent "impassioned and unreasoned" decision against death). This "limited" but pernicious violation of the jury's integrity [23], whose only justification is that jurors "cannot be relied

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21. Even more stark and apposite here, see Parklane Hosiery Co., v. Shore, 439 U.S. 322, 354 (1979) (Rehnquist, J., dissenting): "It is precisely because the Framers believed that they might receive a different result at the hands of a jury of their peers, than at the mercy of the sovereign's judges, that the Seventh Amendment was adopted".

22. See e.g. McCaskill v. State, 344 So.2d 1276, 1280 (Fla.1977) ("Juries are the conscience of our communities" in penalty phase), and Chambers v. State, 339 So.2d 204, 209 (Fla. 1976)(England J., concurring) (since death penalty decision is "reasoned judgment. .., both our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists".) (Emphasis supplied.)

23. See Reid v. Covert, 354 U.S. 1 39-40 (1957) ("slight encroachment" on jury trial and other safeguards may be most dangerous), and Parklane, supra, 439 U.S. at 345-346 (Rehnquist, J., dissenting) ("procedural reform" may erode vital functions of the jury).

upon to vote for death" when State law would make it "the proper penalty", see Witherspoon at 381 U.S. 518-519, is antagonistic to the entire Sixth Amendment concept of the jury as we have known it for 200 years.

In Bloom v. Illinois, 391 U.S. 194, 209 (1968), this Court stressed that although "recalcitrant or irrational juries" may occasionally acquit against the law, we are prepared to run the risk under the Constitution. When the Sixth Amendment requires finality for the outright acquittal of a dangerous criminal (e.g. of a racial murderer, based on approval for the deed)[24], this Court should carefully scrutinize Florida's refusal to accept a verdict of life imprisonment based, at worst, on "charity", see Witherspoon at 391 U.S. 520 and n. 17.

Under Tedder v State, 322 So.3d 908, 910 (Fla.1975), a death sentence after a jury life verdict may be sustained only if "virtually no reasonable person could differ". Thus Florida trial and appellate courts are required, in effect, to determine whether the jury's life decision was based on the evidence and the law, or was "unreasonable"--i.e., based on scruples against the death penalty. Florida's policy ignores the truth that jury verdicts for the accused are final in part because "the courts cannot search the minds of the jurors to find the basis upon which they judge". United States v. Moylan, 417 F.2d 1002, 1006 (CA 4, 1969). (Emphasis supplied.)[25]

Whereas in Illinois an unrepresentative jury imposed the death penalty where a representative panel might choose life, Florida imposes the death penalty after a representative jury actually has chosen life. While Illinois stifled the community's verdict before its birth, Florida strikes it down in esse.

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24. See Powell, supra, 23 Washington and Lee L. Rev. at 5 and 10-11.

25. The fact that under Florida law the jury is instructed that it must base its penalty verdict on statutory findings of fact supported by evidence does not diminish the relevance of Witherspoon, but additionally places the override of a life-decision in conflict with "the maintenance of the jury as a fact-finding body", Patton v. United States, 281 U.S. 276, 312 (1930)

This Court should grant certiorari to clarify the meaning of Witherspoon and the imperatives of the Sixth Amendment when the voice of the community has spoken for life. Obviously a Florida trial judge's power to override a jury death verdict does not violate the values of Witherspoon, see 391 U.S. at 518 n. 12: "At the time of the petitioner's trial, the jury's penalty determination was binding upon the judge. Ill. Rev. Stat., c. 38 Section 360, 801 (1959). That is no longer the case in Illinois, for the trial judge is now empowered to reject a jury recommendaton of death, Ill. Rev. Stat., c. 38 Section 1-7 (c) (1) (1967), but nothing in our decision turns upon whether the judge is bound to follow such a recommendation." (Emphasis supplied.)

D. The Overturning At The State's Behest Of A Representative Jury's Verdict Against The Death Penalty Based On Statutory Findings Of Fact Constitutes A Unique Double Jeopardy Situation Under The Fifth And Fourteenth Amendments.

In the wake of recent decisions permitting "advisory" or appealable decisions in favor of juvenile and criminal defendants, petitioner emphasizes five factors which together make his case a unique and critical test of when life itself has been placed in jeopardy under the Fifth Amendment.

(1) The decision to spare petitioner's life was made by a representative jury, not a referee or judge. See United States v. Sisson, 339 U.S. 267, 334 (1970) (Burger, C.J., dissenting) ("the Constitution gives an accused the benefit of any mistakes in his favor of the first jury he encounters", but does not extend this finality to mistakes by judges). Accord, Westen and Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 130-137 (Fifth Amendment protects jury's inherent finality as conscience of community, but finality of decisions by magistrates and judges is up to legislatures).

(2) The jury's decision for the accused involved the constitutionally mandated choice of life or death, not a mere sel-

ection of discretionary sentencing alternatives. See Lockett v. Ohio, supra, 438 U.S. at 603-605 and n. 13. Both objectively and subjectively, the accused can reasonably be expected to place as much importance on the life/death determination as on the verdict of guilt or innocence itself.[26] Indeed the imposition of a death sentence on a defendant after a jury life determination must cause a truly singular quantum of "continuing anxiety", whether or not the sentence is actually sustained on appeal and carried out.

(3) Unlike any usual sentencing procedure in noncapital cases (or even capital cases before Furman), the Florida procedure requires the jury to base its verdict for either life or death exclusively on statutory findings of fact supported by the evidence. Aside from the consideration of mitigating factors mandated by Gregg and Lockett, supra, the jury is required to resolve aggravating circumstances which the Florida Court has declared "actually define those crimes" punishable be death, see Dixon, supra, 283 So.2d 1, 9 (Fla. 1973), and thus "must be proved beyond a reasonable doubt", id. (emphasis supplied). Thus in 1981, Florida enacts in reality the hypothetical case which Mr. Justice Story found shocking in United States v. Gibert, (Case No. 15,204), 25 Fed. Cas. 1287, 1301 (CCD Mass. 1834): the prolongation by the Government of capital jeopardy after a jury has failed to find "aggravated circumstances" defing a capitally punishable crime:

> "suppose a robbery of the mail, charged in the indictment with being effected by wounding the carrier, or putting his life in jeopardy (which is a capital offense), and there is con-

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26. Compare Difrancesco, id, at ___U.S. ___-___. 66 L.Ed. 2d 3450346 noncapital defendant's "primary concern and anxiety obviously relate to the determination of innocence or guilt", rather than the largely "nonadversarial" matter sentence). Under Green v. United States, 355 U.S. 184, 187-188 (1957), this case is radically distinguished from Difrancesco by the unique degree of "continuing ...anxiety and insecurity" inflicted

> viction of the robbery without such aggravated circumstances, can a new trial be granted, upon the application of the government...? Many other cases of a like nature may easily be put, where the offense in an aggravated form is a capital felony, and without such aggravations not."27/

(4) Unlike the classic case of Stroud v. United States, 251 U.S. 15 (1919), here prolonged jeopardy to suffer the death penalty after a jury has rejected it is the result purely of State action, not of an appeal at the defendant's own behest. In this aspect, Bullington v. Missouri, supra, is similar to Stroud.

(5) In contrast even to the appeal by the prosecution of a jury's lesser offense verdict (on grounds of legal error) allowed in Palko v. Connecticut, 302 U.S. 319 (1937)28/, here the overturning of petitioner's jury life determination did not "wipe the slate clean" of the underlying first-degree murder conviction and did not provide him with the chance to present his case on either guilt or penalty to a second jury of his peers. Again, this is in contrast with both Stroud and Bullington.

In order to interpret for today the guarantee against being put twice in jeopardy of life, this court should grant certiorari.29/

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26. (cont.) while the prisoner awaits appellate review of a death sentence after a jury life verdict. At least one Florida Death Row inmate, Walter Carnes, committed suicide while awaiting review of such a sentence contrary to the verdict of his peers (see Appendix ), and the State appellate process may require an average of 2-3 years. Under Price v. Georgia, 398 U.S. 323 331 (1970), this "is an ordeal not to be viewed lightly" even if the jury's decision is ultimately upheld by the Florida Supreme Court as "reasonable". This case is a perfect example. Here the Florida Supreme Court took five and one-half years to decide the direct appeal.

27. For cases equating aggravating circumstances in schemes like that of Florida with substantive definitions of capital murder, see Jurek v. Texas, 428 U.S. 262, 270 (1976), McGautha v. California, 402 U.S. 183, 206 n. 16, and Wilson v. State, 225 So.2d 321, 325 (Fla. 1969) (statute requiring aggravating circumstances for death penalty would in effect define "other prescribed elements" of first-degree murder) (emphasis supplied).

28. Overruled in Benton v. Maryland, 395 U.S. 784 (1969).

29. Obviously the Fifth and Sixth Amendments do not bar the reduction of a jury death verdict by the trial judge see United

E. Since The Overriding Of a Jury's Verdict For The Accused In A Trial Of Guilt Would Be Not Only Unconstitutional But Shockingly Unfair, Use Of This Procedure In The Penalty Phase Of A Capital Case Should Be Carefully Scrutinized Under The Due Process Clause Of The Fourteenth Amendment.

Under the flexible due process approach of Gardner, supra, this Court should grant certiorari to examine a death penalty procedure which would be not merely unconstitutional but fundamentally unfair in a trial of guilt, and for which the State can offer no persuasive justification beyond the risk of "error" in any criminal jury proceeding.

In Gregg, supra, 428 U.S. 199 n. 50, this Court explained why "arbitrary" mercy is not banned by Furman:

> [I]f a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted.... Such a system, of course, would be totally alien to our notions of criminal justice. (Emphasis supplied.)

Since Florida's procedure is intended to remedy not "the corrosion of substantial legal error" but the jury's verdict against death after an error-free penalty trial, it would fail even the elementary finality test implicit in Palko, supra, 302 U.S. at 328. For such an interpretation of Palko, see Benton, supra, 395 U.S. at 810 (Harlan, J., dissenting): "...I have no hesitation in stating that it would be a denial of due process at least for a State to retry one previously acquitted following an errorless trial." Id., Justice Harlan held this principle of finality as "Indubitably...to be ranked as fundamental."

The need for certiorari is underscored by the fact that overruling a jury's life decision has been condemned as "unfair"

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29. (cont.) States v. Martin Linen Supply Company, 430 U.S. (1977) ban overriding jurors judgment in manner harmful to accused has never prevented a trial judge from ruling in favor of criminal defendant). Accord, Hof v. Capital Traction Co., 174 U.S. 1, 13-14 (1899) (judge may set aside verdict "except on acquittal of a criminal charge").

by a Florida journal advocating the death penalty[30], and has been disaproved for the judge/jury conflict it spawns in a scholarly article generally commending Florida's capital case law. See, Shapiro, First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas and Louisiana, 24 Loyola L. Rev. 709, 736 (1978) (disapproving "the tensions between trial judge and jury inherent in the Florida system"). See also id. at 743-747.

From a due process perspective, Florida's attempt to overturn "unreasonable" life decisions runs afoul of the simple truth stated in Spinkellink v. Wainwright, 578 F.2d 582, 605 (CA 5 1978):

> [R]easonable persons can differ over the fate of every criminal defendant in every death penalty case. (Emphasis supplied.)

It is a further signal of fundamental unfairness when Florida tests a jury's decision for life by the same "reasonableness" standard applied to a criminal conviction or civil verdict. See Jackson v. Virginia, 443 U.S. 307, 317 (1979) n. 10 (power of jury to enter "unassailable but unreasonable" verdict on "side of mercy" does not protect irrational "guilty" verdicts from review and reversal). See also Re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (fundamental fairness "requires a more stringent standard for criminal trials than for ordinary civil litigation").

Following the due process approach of Gardner, this Court might weigh Florida's deviation from the elementary norm of jury

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30. Editorial, "Let Jurors Decide Death Penalty," Miami Herald (April 24, 1980) at p. 6: "No one of conscience who supports capital punishment wants the death penalty imposed under rules that can be applied capriciously. It is more than unfair to the defendant to permit one person--the judge--to sentence him to death when the jury has voted for life imprisonment instead. It is, as well, a near-abandonment of faith in the jury system itself."

finality in light of four factors: (1) The accused's interest in finality; (2) The State's interest in disregarding that finality; (3) Any relevant differences between the guilt and penalty phases of the trial; and (4) The fiscal and administrative impact if the overriding of jury life determinations is prohibited. See also Note, Gardner v. Florida: The Application of Due Process to Sentencing Procedures, 63 Virg. L. Rev. 1281, 1284 n. 28.

Under this test, it is clear: (1) That the accused has an interest in the finality of a jury life decision which at least approximates her or his interest in the finality of an acquittal or lesser offense conviction; (2) That the State has less interest in overturning an "unreasonable" determination for the "severe" penalty of life imprisonment[31] than in overruling the outright acquittal of a dangerous criminal; (3) That Florida's policy is not based on any pertinent difference between the guilt and penalty trials, but merely on the risk of an "unreasonable" verdict for the accused which is inherent in any jury proceeding; and (4) That elimination of Florida's practice will promote rather than hinder both fiscal and judicial economy in death penalty cases.[32]

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31. The Florida Court called life imprisonment "a punishment of great severity" in Wilson, supra, 225 So.2d at 334, and it is more severe not because there is a 25-year minimum without parole under the 1972 Statute (Section 775.082 (1), F.S. 1977).

32. This test gives a radically different result in non capital sentencing. Point by point: (1) The defendant does not have an interest in the sentence comparable to that in the guilt/innocence determination; (3) Noncapital sentencing is a delicate and largely nonadversarial process requiring expertise beyond that of a jury; and (4) Providing for informed jury noncapital sentencing determinations would be most taxing, both fiscally and administratively. See Jury Sentencing in Virginia, supra, 53 Virg. L. Rev. at 969 and 997-998. As to point (2) an egregiously lenient sentence or jury recommendation in a noncapital case might closely approach in result an erroneous acquittal, in a situation where the accused has no overbalancing interest in either innocence or life, see DiFrancesco, supra.

This Court should grant this petition for certiorari in order to review Petitioner's case.

F. Infliction Of The Extraordinary And Controversial Sanction of Death By An Unrepresentative State Judiciary, Contrary To The Verdict Of A Jury Of The People, Conflicts With The Scheme Of Limited And Representative Government Implicit In The Eighth And Fourteenth Amendments, And Violates The Principle Of Judicial Restraint.

Beyond calling into question specific guarantees of the Bill of Rights, the infliction of death after a jury's verdict for life casts a shadow of doubt over our entire scheme of limited government by advice and consent. The broad constitutional values at stake in petitioner's case are an additional and compelling reason for granting certiorari.

In Gardner, supra, 430 U.S. at 357, this Court stated not merely that the death penalty is the ultimate penalty of our entire legal system, but further that "the action of the sovereign in taking the life of one of its citizens differs dramatically from any other legitimate state action". (Emphasis supplied.) Thus the decision to impose the death penalty is extraordinary, and should be especially subject to our overall scheme of democratic checks and balances.

As stressed in Powell, Jury Trial of Crimes, 23 Washington and Lee L. Rev. 1, 7-8, the absolute finality of a jury's verdict for the accused is guaranteed by the double jeopardy bar but far transcends that provision:

> The founding fathers, in light of history, decided that the balance here should be stuck in favor of the individual. To reverse this today would negate the key role of the jury as a check on government. It might even unbalance our entire system of constitutional checks and balances. (Emphasis supplied.)

In Duncan, supra, 391 U.S. at 156, this Court likewise viewed the jury's role as reflecting " a fundamental decision about the exercise of official power", and recently Mr. Justice

Rehnquist emphasized this theme anew:

> "Just as the principle of separation of powers was not incorporated by the Framers into the Constitution in order to promote efficiency or dispatch in the business of government, the right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits." Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 348 (Rehnquist, J., dissenting).

Thus, Florida's practice violates the check of jury finality for the accused in the one situation where it should be most inviolable.

In defending the death penalty under Eighth Amendment community standards, United States Solicitor General Robert H. Bork embraced the view now urged by Petitioner:

> In a representative democracy the legislature speaks for the people that elected it. Once enacted, the penalty cannot be imposed unless the people themselves, acting as a jury of the peers of the accused, agree to its imposition. And the jury, with its prerogative to "nullify" laws and penalties repellent to its sensibilities, is an effective ultimate check against legislative aberrations.
>
> Thus, if a penalty can pass the dual test of enactment by the people's representatives, and application by the people themselves sitting as a jury, it is almost certainly not... forbidden by the cruel and unusual punishment clause (Emphasis supplied.)33/

Since petitioner's death sentence fails such a "dual test", a test in accord with both the enormity of the death penalty and the role of the jury as an organ of our democracy, this Court should grant certiorari.

If Gardner is correct that capital punishment is an extraordinary power of the sovereign, then this Court should carefully measure Florida's procedure of death by dissensus against the constitutional norm of advice and consent for the Nation's gravest and most ominous decisions.

Under our Constitution it is hard to make war and easy to make peace, if either the House of Representatives of the Senate

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33. Gregg, supra, No. 74-6257, O.T., 1975 Brief for the United States as Amicus Curiae at 30-31.

rejects war, that decision is final, though the Nation perish. While the President has sole power to appoint Justices to this Court, a refusal to concur by the Senate is final, though the nominee be worthy and the Senate's motive be not merely "unreasonable" but petty or partisan.

By unleashing the dog of capital punishment against the will of a representative jury, Florida defies the preference of our entire Constitution for error on the side of caution and restraint. Florida violates the norm of democratic pluralism by compelling the community to accept the death penalty after its representative voice has spoken for life. [34]

In this case, the State after a full hearing was unable to persuade the trial jury that death was appropriate. The State now maintains that Petitioner must be executed because "virtually no reasonable person" could agree with the jury. Such an execution rends the legal fabric of democracy itself. [35]

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34. The State may not settle the matter simply by referring to a contrast between guilt determination and sentencing. Just as the declaration of war may seem more akin tothe military and foreign policy responsibilities of the President than to the normal legislative function of Congress, so the individualized determination of life or death may (especially in the weighing of mitigating circumstances) appear more similar to noncapital sentencing than to a simple decision on guilt. However, like war, the decision to impose death transcends normal categories, and may not be taken against the advice and consent of a jury without undermining the legitimacy of the decision. In contrast, just as the President may take or ignore advice from Congress on normal military and foreign policy decisions, so a sentencing judge in a noncapital case may follow or disregard a jury's recommendation for leniency without compromising basis democratic values.

35. Florida's possible interest in preserving the challenged procedure on the basis of federalist pluralism is vitiated by the very anti-pluralistic nature of compelling a community to accept the death penalty when its representative voice has spoken for life. Granting certiorari would show a concern for

The Florida Court very recently stressed that when it affirms death sentences, "we are...the messengers, and not the message". Brown v. Wainwright, 392 So.2d 1327, 1333 (Fla.1981).

Here, however, the people's message was for life, and the Florida judiciary acted not merely as the messenger but as the decreers of death.

In past death penalty cases, Justices of this Court have faced the "excruciating agony" of judicial restrain in deference to popular decisions for the death penalty. Furman, supra, 408 U.S. at 405 (Blackmun, J., dissenting). In this case, where the representative voice of thejury and the bias of our system in favor of life are in tandem, the warning of Mr. Justice Rehnquist carries special weight, id. at 470:

> [J]udicial overreaching may result in sacrifice of the equally important right of the people to govern themselves.

In order to clarify the meaning of judicial restraint when the conscience of the community has spoken for life, this Court should grant certiorari.

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35. (cont.) the true pluralism reflected by petitioner's jury. Moreover, the variety of death penalty statutes employed by jurisdictions which respect the jury's life determination show that "pluralism" will not be curbed if petitioner prevails.

G. It Is A Violation Of The Petitioner's Due Process Rights Under The Fourteenth Amendment To Overrule The Jury's Life Verdict Where The Jury Has Properly And Reasonably Weighed The Aggravating Circumstances Against The Mitigating Circumstances.

This Court has ruled that the three level review system of the Florida capital punishment statute is constitutional on its face. Proffitt v. Florida, 428 U.S. 242 (1976). The use of the aggravating versus mitigating factors test rather than an objective formula test does not render the statute unconstitutional. Id. However, implicit in this holding is the principle that application of these tests is unconstitutional if the result is arbitrary, freakish, or unreasonable in light of the evidence. Id.

The standard enunciated by the Florida Supreme Court is that the jury's verdict should be overridden when the "...facts are so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla.1975); State v. Dixon, 283 So.2d 1 (Fla.1973). Only in this extraordinary situation where the jury's verdict was manifestly unreasonable did this Court approve the use of the override procedure. Proffit v. Florida, 428 U.S. 242 (1976).[36]

In this case, rejection of the jury's verdict was not safeguarded from unconstitutional arbitrariness by final review of the Florida Supreme Court. See Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973). Analysis of the review of these standards in this case by the Florida Supreme Court demonstrates the failure of Florida's system to sustain verdict rejection only where the jury acted unreasonably.

1. The jury properly weighed the aggravating circumstances.

The trial judge and the Florida Supreme Court found three aggravating circumstances.

That the petitioner was previously convicted of a felony

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36. Remarkably, 22% of all capital sentencing juries since 1973 in Florida have acted unreasonably so as to warrant judicial rejection of the verdict. 24 of 155 death row inmates have had jury life verdicts overruled by trial judges who found the verdicts unreasonable. Since Proffitt, supra, in practice, Florida has proved its system does not limit use of this procedure to extraordinary cases. (See Appendix E and F)

involving violence was settled in Florida law by the decision below that a guilty plea is tantamount to a "conviction" notwithstanding the fact that no formal adjudication of the charge has been made.[37] (Appendix A)

The second aggravating factor was that the crime was especially heinous, atrocious or cruel. From the outset, the use of this phrase to measure imposition of a death sentence should be questioned. To be sure, all unjustifiable murders must be heinous, atrocious and cruel. Whether a particular murder is "especially" heinous, atrocious or cruel begs the question. To date no Florida case has focused on the word "especially" to distinguish crimes where death is appropriate or not. The definitions of heinous, atrocious or cruel by the Florida Court are not enlightening.[38] The definitions are as subjective as the words they interpret. This standard is capricious per se since it can reasonably be applied to any unjustified homicide. See Furman v. Georgia, 408 U.S. 238 (1972).

On this aggravating circumstance the Florida Supreme Court pointed to evidence that: the victim was brutally beaten about the head and chest; blood was splattered in the apartment; the victims ribs were crushed and she died from asphyxiation within four minutes; the victim must have suffered agony and horror prior to her death. (Appendix A). On the evidence presented, it was not possible to determine the time at which death occurred or the degree of suffering inflicted on the victim. There were no eyewitnesses. The cause of death was asphyxiation; not the blood producing injury. (R.499-512). Plainly, the jury may not have been swayed by the sensationalistic and grotesque crime scene as were the trial judge and the Florida Supreme Court. The

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37. The court offered no explanation for the apparent conflict between this holding and its statement that the court "... is firmly committed to the doctrine that a legal conviction of a crime includes a judgment of the court as well as a plea or a verdict of guilty." Ellis v. State, 100 Fla. 27, 129 So.106, 108 (1930).

38. "... heinous means extremely wicked or shockingly evil....atrocious means outrageously wicked and vile....cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others." State v. Dixon, 283 So.2d 1,9 (Fla.1973).

jury, apparently did not find this aggravating circumstance was proved beyond a reasonable doubt as required by State v. Dixon, 283 So.2d 1,9 (1973).

The third aggravating circumstance was that the murder happened during the commission of a rape. This finding was not proved beyond a reasonable doubt. The Florida Court acknowledged this in its opinion. "The rape occurred either shortly before or immediately following Ms. Mears' death." (Appendix A) If the rape occurred after Mrs. Mears' death, it was not a rape at all, since rape cannot occur on an already murdered victim. The essence of the crime of rape presupposes a living, unwilling victim. Moreover, the Florida Court did not interpret the words "...was committed while the defendant was engaged... in the commission ..." Fla. Stat §921.141 (b)(d). Accordingly the jury was not "unreasonable" if it found this aggravating circumstance was not proved beyond a reasonable doubt.[39]

2. The jury properly weighed the mitigating circumstances.

The Florida Supreme Court said there was no other explanation for the jury's verdict except a finding that the defendant acted under the influence of extreme mental or emotional disturbance.[40] (Appendix A). The Court summarized the uncontroverted testimony of three court appointed psychiatrists:

> While all three doctors concluded that appellant's mental disorders created violent and uncontrolled behavior, appellant was found competent to stand trial. Specifically, Dr. Mordecai Haber observed that McCrae (sic) suffered from a disorder which contributed to an explosive personality. The doctor concluded that McCrae (sic) was mentally competent but too dangerous to be at liberty in society. Dr. Thomas Haagland found that McCrae (sic) was capable of giving aid to his counsel and when sober, was a well contained individual who had firm control over his faculties. However, when under the influence of intoxicants, appellant released an underlying epileptic furor

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39. Even if the facts seem compelling the traditional power of a jury may be be used to refuse to find an aggravated offense. See e.g. Green v. United States, 355 U.S. 184 (1957).

40. Fla. Stat §921.141(6)(b)(1973).

> which erupted into uncontrolled violent behavior. Dr. Clarence Schlit, who testified during the bifurcated phase of the trial stated that McCrae (sic) was subject to attacks when under emotional stress which prevented him from exercizing the restraint which would be present in a normal individual. Although the doctor stated that appellant was not insane, he did determine that McCrae (sic) suffered from a chronic schizophrenic illness and that he was unlikely to cooperate with defense counsel. McCray v. State (Appendix A).

Specific evidence in the record underscored the findings of these physicians. Petitioner was in the psychiatric ward while in the U.S. Army. (R.883-1024). Prior to the trial he had made at least three suicide attempts (R. 883,884,1006). He hears voices which are not there are regards this as normal. (R.1006). Petitioner suffers from "organic brain syndrome" and epilepsy. (R. 1022). He has a "temporal lobe seizure disorder." These findings were confirmed by an electroencephalogram. (R.1022).

The relationship between epilepsy and violent crime has been recognized by scholarly researchers whose work has been cited by this Court.[41] Report of the Royal Commission on Capital Punishment (Appendix J).

The trial judge simply stated the "good doctor" (referring only to Dr. Schlit) could not describe his opinions within "any degree of medical certainty." No other explanation for rejecting the jury's finding based on this testimony was given. (order quoted in opinion below Appendix A). Moreover, the trial judge ignored the consistent views of the two other psychiatrists.

Likewise, the Florida Supreme Court, noting that this evidence apparently was the basis of the jury's advisory verdict simply said, "We find their recommendation has no reasonable basis under the circumstances of this cause." (Appendix A) No reason for discounting this evidence or the jury's interpretation of it was offered by the Court.

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41. See e.g. Gregg v. Georgia, 428 U.S. 153 (1976); McGautha v. California, 402 U.S. 183 (1971).

Clearly, the jury acted reasonably in reaching its verdict.

To permit this judicial rejection of a jurys reasonable findings would erode the rights of the people as Mr. Justice Rehnquist warned:

> [J]udicial overreaching may result in sacrifice of the equally important right of the people to govern themselves. Furman v. Georgia,408 U.S. 238, 470 (1972).

Certiorari should be granted to enforce the petitioners rights under the Fourteenth Amendment.

H. Overruling The Jury's Life Verdict By A Biased Trial Judge Whose Decision Was Based On Non-Statutory Factors Violates The Due Process Clause Of The Fourteenth Amendment.

Implicit in Proffitt v. Florida, 428 U.S. 242 (1976) and Gardner v. Florida, 430 U.S. 349 (1977) are the requirements that the jury and the trial judge base their determinations for sentencing on the aggravating and mitigating circumstances which this Court has approved,[42/] and that any outside influences must be fully disclosed to all parties. If these fact finders can reach outside the standards approved in Proffitt, supra, for justification of a death sentence the entire superstructure of Florida's capital punishment statute fails the tests of Furman, supra. Sanctioning other influences as part of the sentencing process opens the door to arbitrary and capricious influences which undermine uniformity, consistency and fairness in the application of the death penalty. In this case the record shows that the trial judge considered irrelevant inflamatory evidence and his own political beliefs in his order overruling the jury's advisory verdict.

The order of the trial judge (R.1090, setforth in the opinion below Appendix A) begins with the comment that Petitioner seemed nervous while F.B.I. fingerprint evidence was being received. In another part of the order the judge remarked that the Petitioner could not explain how his bloody fingerprints were found in the victims apartment.

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42. In State v. Dixon, 283 So.2d 1, 9 (1973) the court admonished that the sentencing determination is to be made within the framework of the statutes aggravating and mitigating factors.

These observations are irrelevant to the issue the court faced in making his written findings of fact to justify the death sentence. Although the observations may be relevant to the question of guilt versus innocence, they do not relate to any of the aggravating circumstances contained in the statute.

Likewise, discussion of evidence concerning alleged[43] efforts by the petitioner to gain entrance to the residences of other elderly females inthe neighborhood wsa not related to the issue before the Court.

The manner in which these statements appear in the sentencing order suggest some bitterness or hostility on the part of the trial judge against the Petitioner.

The trial judge in this case is an outspoken proponent of capital punishment. In protest of Furman, supra, he, acting alone, threw a hangman's noose over a tree limb in front of the Lee County Florida Courthouse. Reflecting upon the sentence he gave Petitioner the judge said he was motivated by the belief that the sentence would never be carried out! (Appendix B) If veniremen with strong personal beliefs about capital punishment can constitutionally be excluded from juries in capital cases, Witherspoon v. Illinois, 391 U.S. 510 (1968), trial judges holding similar or opposite views must somehow be screened so as to prevent vesting sentencing determination in the hands of a factfinder who may be catagorically insensitive to the evidence and sentencing options available. Thus, this case demonstrates how the advisory sentencing jury procedure sanctions arbitrariness by a trial judge. c.f. Furman v. Georgia, 408 U.S. 238 (1972); Witherspoon v. Illinois, 391 U.S. 510 (1968).

II. THE FAILURE OF THE FLORIDA SUPREME COURT TO DECIDE PETITIONERS DIRECT APPEAL FOR MORE THAN FIVE AND ONE HALF YEARS AFTER THE FILING OF BRIEFS AND ORAL ARGUMENT CONSTITUTES A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioners initial brief in the Florida Supreme Court was filed in October 1974. Oral Argument before the court was had in March

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43. The witnesses who testified at trial on this issue were unable to positively identify petitioner as the man who they had seen. (R.606,632, 646, 635-640).

of 1975. No adjudication was made. On August 18, 1978 Petitioner filed a motion for determination of his appeal. By order dated September 7, 1978 the motion was denied without comment,explanation or opinion (Appendix C).

The right to appeal a judgment of conviction and sentence is a fundamental due process right guaranteed to every defendant under the Fourteenth Amendment to the constitution. The stated public policy of Florida is that capital appeals should be handled expeditiously. For this reason a direct right of review by the Florida Supreme Court is provided. In addition, the time tables normally applicable to civil and criminal appeals are shortened in capital cases. See Florida Statute §924.08 (1973). The unexplained an indefensible delay by the Florida Court of more than five and one half years in deciding the Petitioner's appeal is a denial of the Petitioner's fundamental constitutional right to a prompt adjudication of his case.

The effect of this delay by the Court has produced a practical result of compelling the Petitioner to serve a sentence not handed down by the Court. Since his arrest before trial, the Petitioner has been incarcerated in the Florida state prison system. He remains so incarcerated at this time. The Petitioner has served a jail sentence of almost eight years. However, no Court has ever sentenced the Petitioner to a term of years in jail. To be sure it is reasonable for the State to place and keep a Defendant in custody for a brief period of time prior to the carrying out of a death sentence. However, here the Petitioner remains incarcerated for an extended and an unreasonable period of time due to the failure of the judiciary to carry out its constitutionally and statutorily mandated responsibilities to decide his appeal expeditiously, the incarceration which is a result of the delay constitutes a violation of the 8th and 14th Amendment rights of the Defendant. See, United States v. MacClain, 501 F.2d 1006 (C.A.Colo. 1974); Johnson v. Glick, 481 F.2d 1028 (C.A.N.Y. 1973) cert. den. 414 U.S. 1033 (1973).

## CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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BY _____
PHILIP M. GERSON

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition of Certiorari was mailed to all parties required this 8 day of June, 1981 as follows: Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Fl; and to James Curtis McCray, P.O. Box 747, Starke, Fl 32091.

LAW OFFICES OF PHILIP M. GERSON, P.A.

BY _____
PHILIP M. GERSON

# APPENDIX A

# Supreme Court of Florida

No. 45,894

JAMES CURTIS McCRAE, Appellant,

v.

STATE OF FLORIDA, Appellee.

[October 30, 1980]

PER CURIAM

This is a direct appeal from a conviction of murder in the first degree and a sentence of death rendered in the circuit court for Lee County, Florida. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and affirm the conviction and sentence.

On October 15, 1973, Margaret Mears, a sixty-seven-year-old woman, was found dead in her apartment. Her body, unclothed from the waist down, had been brutally beaten about the head and chest, and her vaginal area was covered with blood. A bloody palm print lifted from her apartment was identified as that of the appellant, James Curtis McCrae. McCrae was subsequently indicted for two counts of murder in the first degree, one count charging a premeditated killing, and the other charging felony murder.

In order to determine his competency to stand trial, appellant was examined by three court-appointed psychiatrists. While all three doctors concluded that appellant's mental disorders created violent and uncontrolled behavior, appellant was found competent to stand trial. Specifically, Dr. Mordecai Haber observed that McCrae suffered from a disorder which contributed to an explosive personality. The doctor concluded that McCrae was mentally competent

but too dangerous to be at liberty in society. Dr. Thomas Haagland found that McCrae was capable of giving aid to his counsel and, when sober, was a well-contained individual who had firm control over his faculties. However, when under the influence of intoxicants, appellant released an underlying epileptic furor which erupted into uncontrolled violent behavior. Dr. Clarence Schlit, who testified during the bifurcated phase of the trial, stated that McCrae was subject to attacks when under emotional stress which prevented him from exercising the restraint which would be present in a normal individual. Although the doctor stated that appellant was not insane, he did determine that McCrae suffered from a chronic schizophrenic illness and that he was unlikely to cooperate with defense counsel.

At trial, the state introduced the testimony of four witnesses for the alleged purpose of showing identity or establishing a common scheme or plan. Edith Veal testified that she lived near the victim. At the purported hour of the crime's commission, she stated that a young black male with a cast on his arm fitting the same general description as appellant, knocked on her door and asked for Wayne Miller. Mrs. Veal stated that no one by that name lived at her residence. The man then asked if her husband was home. While Mrs. Veal was unable to identify appellant at a pretrial lineup, she was able positively to identify him upon being recalled to the witness stand.

Muriel Bergner similarly testified that she lived in close proximity to the victim. According to her testimony, on October 14, 1973, the day before the victim's body was found, a young black male also fitting McCrae's general description approached her while she was walking her dog, to ask directions. The man walked away, but returned, again asking questions. At that point, Mrs. Bergner walked hurriedly to her home and locked the door. She succeeded in fastening the lock just before the man arrived at her doorstep. The state also called Dorothy Hendley who testified that while walking her dog, a man whom she positively identified as appellant approached her and asked questions similar to those asked of Muriel Bergner.

Faith Lederman Gertner and William Smith testified that McCrae came to Mrs. Gertner's apartment on June 8, 1973, searching for Randy Williams. When informed that Williams did not live there, McCrae left but returned shortly thereafter, and asked Mrs. Gertner to accompany him downstairs. She refused, but William Smith agreed to go in her place. Once they walked downstairs, McCrae took a swing at Smith and fled. Later that evening, appellant returned and forced the door open. He drew a gun and shot Smith. He then beat Mrs. Gertner about the face with the gun and choked her before fleeing again.

After the state rested, appellant took the stand in his own behalf. During direct examination, he was asked if he had been convicted of misdemeanors and if he had pleaded guilty to those charges. Appellant responded in the affirmative to both questions. His counsel then asked if he was ever convicted of a felony, to which appellant again answered affirmatively. On cross-examination, the state attorney sought to elicit the nature of the felony charge. Overruling defendant's objection, the court required McCrae to disclose to the jury that he had pleaded guilty to assault with intent to commit murder on the ground that appellant's counsel had "opened the door" to such questioning.

After the close of the evidence, the jury returned a verdict of guilty on the felony-murder count, but recommended a life sentence. As required by section 921.141(3), Florida Statutes (1975), the trial judge made findings of fact wherein he rejected the recommendation of the jury and entered a judgment calling for the death sentence. Specifically, he stated:

> As presiding Judge I observed the Defendant when evidence was introduced and especially when the fingerprint expert from the F.B.I. was testifying, the Defendant [appellant] appeared extremely nervous and upset when this evidence was being received. Throughout the trial, as the story unfolded, the Court was struck with the heinous, atrocious and cruel murder of this elderly woman.
>
> The Court was also aware that a person answering the description of the Defendant tried to gain entrance to the homes of two other elderly women in the same close neighborhood wherein the deceased lived in her apartment at or about the time shortly connected with the death of the deceased.

The Court is also aware that the testimony proved that the Defendant, a few months before the instant case at bar, brutally attacked a female by the name of Faith Lederman [Gertner] after he, the Defendant, had shot and seriously wounded William R. Smith, which as a result of said attack, the Defendant stood before the Court and voluntarily pleaded guilty to the crime of assault with a deadly weapon with intent to commit first degree murder.

The record in Case No. 73-372 CF, Lee County docket, reveals that the Defendant plead guilty to this charge on September 11, 1974, just about one month before the murder of Margaret Mears, the deceased in the case at bar.

The Defendant was permitted to remain at liberty on bail pending the pre-sentence investigation report on Case No. 73-372 CF.

During the time the Defendant was at liberty on bail between September 11, 1973 and October 29, 1973, the murder for which the Defendant was tried and convicted in the instant case was committed.

It is interesting to note that the Defendant's fingerprints taken when he was convicted for the crime laid in Case No. 73-372 CF matched the bloody fingerprints lifted from the residence and premises occupied by the deceased, Margaret Mears, and thus resulted in the indictment and conviction of the Defendant in the case at bar.

The Court before the trial was interested in the mental state of the Defendant, and appointed experts in the field of psychiatry to thoroughly examine the Defendant. The Court held hearings on the question of the mental condition of the Defendant and after hearing the testimony of such experts held that the Defendant was fully able to distinguish the difference between right and wrong and could fully cooperate with his counsel in the preparation and conducting of his defense.

The Defendant did fully cooperate with counsel during the trial and actively advised counsel and was fully aware at all times of the proceedings during the trial.

The Defendant took the witness stand in his own behalf and demonstrated that he, the Defendant, had an excellent memory, but could not explain how his bloody fingerprints and palm prints were found on the wall near the back door of the deceased's apartment or upon books and other items in the residence.

The evidence discloses that the deceased was so brutally and viciously beaten that her blood was splattered upon the walls and ceiling of her residence, and the evidence further discloses that this elderly woman was raped, either just before her death or directly after she was murdered.

The Court sets forth the above facts as they fully appear in the trial record, and the record taken by the Official Court Reporter.

The mitigating circumstances are very minor.

The Defendant, in order to show the jury that at the time of the crime he was "under the influence of extreme mental or emotional disturbance" placed Dr. Clarence Schilt on the stand, however the good doctor could not with any degree of medical certainty say in his opinion the Defendant was so affected. The doctor in his summation stated that the prisoner was either very smart or very sick.

Therefore, when the Court takes into consideration the aggravating circumstances such as:

1. The Defendant was a self-convicted felon, pleading guilty to assault to murder, and as an incident thereto, from the trial record that the Defendant had beat [sic] and choked the witness Faith Lederman in a brutal assault upon her, just a few weeks prior to the murder of Margaret Mears, and

2. That the Defendant had on the same night of the murder tried to gain entrance to the residences of two other elderly females in the same locality, and

3. That the crime was committed "according to the jury verdict" in the commission of rape, and

4. That the murder was especially heinous, atrocious, brutal and cruel.

The Court feels that these facts greatly outweigh any mitigating circumstance heard by the Court at the trial of the Defendant.

The Court further feels that the testimony of Dr. Clarence Schilt in its entirety is not sufficient to outweigh the aggravating circumstances as set forth above and as they fully appear in the record in this case.

The Court is fully aware of the great responsibility that rests squarely upon the trial Judge in matters of this kind. The Court has struggled with the weighty decision that must be made in this case, and in making the determination to override the decision of the jury that advised the sentence of life imprisonment.

The Court is not chastising or inferring that the jury was lax in their responsibility. However, as it may appear the Court feels that it is the responsibility of the Court to follow the law as written by the wisdom of our various lawmakers; that society must be protected and that an example must be set forth and made apparent so that our citizens may be secure in their homes and that they may be safe from the experiences that Margaret Mears suffered at the hands of the convicted Defendant.

The Court therefore rejects the advisory sentence of the jury in this case and will pass the sentence of death upon the Defendant, JAMES CURTIS McCRAE.

The Court feels that this action upon its part is dictated by the facts and circumstances gleaned from

> the trial record and that sufficient aggravating circumstances exist as enumerated in Subsection 6 to greatly outweigh any mitigating circumstances as set forth in Subsection 7 of Section 921.141, Florida Statutes.

TR. vol. VII, 1090-95.

Appellant urges five points for reversal. We restate these points below:

(i) whether the trial court erred in allowing the state to question McCrae about a prior unrelated felony on cross-examination; (ii) whether the trial court erred in admitting the testimony of Edith Veal, Muriel Bergner, Faith Gertner and William Smith; (iii) whether the trial court's imposition of the death penalty denies appellant due process and equal protection of law and violates the mandate of Furman v. Georgia, 408 U.S. 238 (1972), because there is no rational distinction between first degree murder and murder in the second degree; (iv) whether the sentencing procedure enunciated in chapter 921, Florida Statutes (1975), is violative of the constitutional mandate of Furman v. Georgia both on its face and as applied to McCrae; and (v) whether the court erred in overruling the life sentence advisory verdict of the jury.

Following oral argument of respective counsel on these issues, appellant filed in this Court a motion for new trial with supporting affidavit pursuant to Florida Rule of Criminal Procedure 3.600, alleging newly discovered evidence. In the sworn affidavit, Otis Walker, a material witness at the trial of appellant, averred essentially that he testified falsely at trial due to coercion and the promise of a "deal" by state officials. Appellant contended that Walker's assertion established a violation of Brady v. Maryland, 373 U.S. 83 (1963) and, accordingly, that he was entitled to a new trial. In an order dated November 29, 1978, we pointed out that a motion under rule 3.600 is an inappropriate pleading in an appellate court; such a motion must be addressed to the trial court. Further, because the time limit for filing this motion in the proper tribunal had expired, the only remedy for the alleged Brady violation was a motion in the trial court to vacate judgment and sentence under

Florida Rule of Criminal Procedure 3.850. Although appellant's affiant had denied under oath at trial that he was offered a "deal" in exchange for his testimony in that proceeding, this Court nevertheless relinquished jurisdiction to the trial court to enable appellant to file a rule 3.850 motion raising the alleged Brady violation.

Appellant thereafter filed the motion in the trial court and, on December 18, 1978, after hearing the evidence and argument presented by the parties, the trial court entered an order denying the requested relief. The judge found "that the testimony before this Court of OTIS WALKER . . . is, in fact, untrue," and concluded that no Brady violation had occurred. Although appellant filed a notice of appeal from that order, he has not informed this Court of the grounds of his attack. Nevertheless, we have reviewed the record of the rule 3.850 proceedings. We are satisfied that the trial judge correctly ruled on the motion and, accordingly, that ruling is affirmed. We now turn to the issues on appeal.

The first point raised by appellant challenges the ruling of the trial court allowing the prosecutor to cross-examine appellant with respect to his prior criminal record. Appellant concedes that the state is entitled to cross-examine him on those issues developed during direct examination. However, he argues that the state exceeded this scope of permissible inquiry when it sought to elicit the nature of the felony to which appellant referred on direct. According to appellant, the defense established only that he had been accused of a felony and that he had admitted his guilt.

We agree that on cross-examination the state must, as a general rule, limit itself to questions no broader in scope than those propounded by the defense. Cortes v. State, 135 Fla. 589, 185 So. 323 (1938); Cook v. State, 46 Fla. 20, 35 So. 665 (1903); 98 C.J.S. Witnesses, §§ 378, 393(b), 395, 401(2) (1957). In the instant case, however, the state properly transcended these bounds because defense counsel, through his questions on direct examination, tactfully attempted to mislead the jury into believing that

appellant's prior felony was inconsequential. On direct examination, appellant's counsel asked his client:

> Doug, at this time I would like to ask you a few questions. I would like to begin by asking you: Have you ever been convicted of a misdemeanor?
>
> A. Yes, I have.
>
> Q. Do you recall how many times you have been convicted of a misdemeanor?
>
> A. Well, I would say over the past nine or ten years possibly about nine or ten misdemeanors.
>
> Q. Did you pay fines or did you serve time for these misdemeanors?
>
> A. I paid fines.
>
> Q. Do you recall how much in the way of fines you may have paid for misdemeanors total?
>
> A. Yes. I paid a total of $445 in fines.
>
> Q. Doug, have you ever been convicted of a felony?
>
> A. Yes, I have, one.
>
> Q. One time?
>
> A. Right.
>
> Q. Doug, these misdemeanors, this felony you told me about, were you found guilty by a judge or a jury?
>
> A. No, I was not; I pled guilty.
>
> Q. You pled guilty?
>
> A. Yes.
>
> Q. Why did you plead guilty?
>
> A. Because I was guilty.
>
> Q. How did you plead to this charge against you that you are here for today?
>
> A. Not guilty.
>
> Q. Why did you plead not guilty, Doug?
>
> A. Because I'm not guilty.

This line of questioning could have deluded the jury into equating appellant's conviction of assault with intent to commit murder with his previous misdemeanors. Consequently, the state was entitled to interrogate appellant regarding the nature of his prior felony in order to negate the delusive innuendoes of his counsel. As stated by one learned scholar:

> [T]he rule limiting the inquiry to the general facts which have been stated in the direct examination must not be so construed as to defeat the real objects of the cross-examination. One of these objects is to elicit the whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross-examination.

4 Jones on Evidence, Cross Examination of Witnesses § 25:3 (6th Ed. 1972) (footnote omitted). A defendant cannot take advantage on appeal of a situation which he has created at trial. See Sullivan v. State, 303 So.2d 632 (Fla. 1974); White v. State, 348 So.2d 1170 (Fla. 3d DCA 1977); Jackson v. State, 336 So.2d 633 (Fla. 4th DCA 1976).

Appellant next argues that the trial court erred in admitting the testimony of four witnesses introduced by the state in its case in chief. Initially, appellant contends that the testimony of Edith Veal and Muriel Bergner, placing him in the immediate area where the crime was committed at the approximate hour of its commission, should have been excluded for three reasons: (1) the two witnesses were unable positively to identify him and, therefore, their testimony was irrelevant; (2) assuming there had been a positive identification, there was no relevance between Mrs. Veal's and Mrs. Bergner's experience and the crimes committed; and (3) the testimony of the two women did not suggest an attempt to commit similar crimes against them.

Any testimony relevant to prove the fact in issue is admissible unless precluded by some specific rule of exclusion. Johnson v. State, 130 So.2d 599 (Fla. 1961); Williams v. State, 110 So.2d 654 (Fla. 1959). Furthermore, relevant evidence will not be excluded merely because it points to commission of a separate crime, unless its sole relevance is to point up bad character or the criminal propensity of an accused. Mackiewicz v. State, 114 So.2d 684 (Fla. 1959); Williams v. State; Jordan v. State, 171 So.2d 418 (Fla. 1st DCA 1965). As appellant correctly notes, the testimony of Edith Veal and Muriel Bergner did not present evidence of another crime, thereby suggesting appellant's criminal propensities. Because appellant has not

suggested any other specific rule mandating that this testimony be excluded, the witnesses' testimony is admissible if it is relevant.

Although appellant argues that the testimony of Mrs. Veal and Mrs. Bergner is irrelevant because they failed to identify him, he ignores the fact that both witnesses stated that the person who attempted to gain entrance to their homes met the general description of appellant. Both women described an individual closely resembling appellant who, on October 13, 1973, was in the immediate area where the crime was committed at the approximate time of its commission. Therefore, their testimony was relevant and admissible as to the issue of identity. Appellant's contentions are merely questions for the jury as to the weight to be accorded the testimony.

Appellant also argues that the testimony of Faith Gertner and William Smith was irrelevant because the incident which they described occurred almost six months before the instant crime. Similarly, appellant submits there was no factual thread connecting the two events. We disagree. Mrs. Gertner's testimony was admissible because she was able to identify the appellant and because, allegedly, she established that a common plan or scheme was employed by appellant to gain admittance to the victims' homes. Bryant v. State, 235 So.2d 721 (Fla. 1970); Winstead v. State, 91 So.2d 809 (Fla. 1956).

Appellant's third point is that he was denied due process and equal protection of law when he was charged under section 782.04(1)(a), Florida Statutes (1975), the first degree murder statute, rather than for murder in the second degree under section 782.04(2). This Court's decisions in Adams v. State, 341 So.2d 765 (Fla. 1976), and State v. Dixon, 283 So.2d 1 (Fla. 1973), dictate that appellant's argument must fail on this issue.

Appellant's fourth point has been decided adversely to his cause in State v. Dixon.

Appellant argues further that the trial court violated the principles espoused in Tedder v. State, 322 So.2d 908 (Fla. 1975), in overruling the advisory verdict of the jury for a life sentence. During the sentencing phase of the proceedings the court found three

aggravating circumstances under section 921.141(5), Florida Statutes (1975): (1) that appellant was previously convicted of a felony involving the use or threat of violence to the person [subsection (b)]; (2) that the crime was committed while appellant was engaged in the commission of a rape [subsection (d)]; and (3) that the crime was especially heinous, atrocious and cruel [subsection (h)]. The finding of the second aggravating circumstance under section 921.141(5)(b) was clearly proper. Further, the trial judge determined correctly that the crime was especially heinous, atrocious or cruel. The evidence disclosed that the victim, a sixty-seven-year-old woman, was so brutally beaten about the head and chest that her blood was splattered upon the walls and ceiling of her residence. According to the testimony of Dr. Rosier, the medical examiner who viewed the scene of the crime and performed an autopsy on Ms. Mears, the pattern of blood stains on the wall indicated that she was either sitting or standing when the attack began. At some point the victim was thrown to the floor and her ribs were crushed, resulting in death by asphyxiation within four minutes thereafter. (Tr. vol. III, 499-512.) The rape occurred either shortly before or immediately following Ms. Mears' death. The agony and horror which this elderly woman must have suffered prior to her death is evident. As we acknowledged in State v. Dixon, 283 So.2d at 9, section 921.141(5)(h) applies to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." The killing in this case falls squarely within this category when viewed in the context of prior decisions of this Court where we have approved a finding of this aggravating circumstance. See Washington v. State, 362 So.2d 658 (Fla. 1978) (victim repeatedly stabbed while tied to a bed, with evidence of suffering); Barclay v. State, 343 So.2d 1266 (Fla. 1977) (victim stabbed while begging for mercy and then killed by shots to the head); Adams v. State (victim beaten with fire poker past point of submission and until grossly mangled.)

The appellant further contends that the trial judge improperly found under section 921.141(5)(b), Florida Statutes (1975), that he had been previously "convicted" of a felony involving the use or threat of violence to the person. At the time of his trial in the instant case, McCrae had already pleaded guilty to assault with intent to commit murder upon Faith Gertner and William Smith. Pending sentencing on this charge, he was released on bail without adjudication of guilt, awaiting the completion of the presentence investigation report. Shortly after his release on bail, McCrae, as found by the jury in this cause, sexually assaulted and murdered the victim, Margaret Mears. McCrae contends that he had not been convicted of his prior offense against Gertner and Smith because the judge had not adjudicated him guilty. We reject this contention and find the plea of guilty to a felony involving the use or threat of violence to the person is a conviction which may be used in aggravation under section 921.141(5)(b) and was so intended by the legislature.

In Robinson v. State, 373 So. 2d 898 (Fla. 1979), we held that a plea of guilty is an in-court confession and an agreement for the court to enter a judgment. We further cited with approval the decision of the United States Supreme Court in Boykin v. Alabama, 395 U.S. 238, 242 (1969), which stated: "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." [Emphasis supplied.] These decisions recognize that once a plea of guilty has been accepted by a court, it is the conviction and the only remaining step is the formal entry of judgment and the imposition of sentence.

Further, in determining whether the death penalty should be imposed, a court must consider the various circumstances set forth in section 921.141. These circumstances aid the judge in

establishing the overall character analysis of a defendant so that he may properly determine the appropriate sentence within the limits set forth in the law. Elledge v. State, 346 So. 2d 998 (Fla. 1977). Prior convictions of violent felonies is an extremely important factor in the sentencing process. Given the purpose of this process, it is illogical that a plea of guilty to a serious offense involving violence that is disposed of by a sentence that includes a withholding of adjudication of guilt should be treated differently than a plea of guilty with court adjudication. Both contain an unrefuted factual determination that the defendant committed this prior criminal offense.

In interpreting "conviction" for the purposes of section 921.141(5)(b), we reject any analogy to the habitual offender statute set forth in section 775.084. The habitual offender statute creates a separate criminal offense that requires both (a) a determination of guilt by a jury or a plea of guilty, and (b) an adjudication of guilt by the court. Washington v. Mayo, 77 So. 2d 620 (Fla. 1955). This statute was enacted by the legislature "to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed." Joyner v. State, 30 So. 2d 304, 306 (Fla. 1947). It is a new and separate criminal offense, and "adjudication of guilt" is a necessary element of the offense.

On the other hand, this Court in Elledge v. State recognized the purpose for considering prior criminal conduct in the capital sentencing process is to ensure a proper character analysis to determine if the ultimate penalty of death should be imposed. Specifically, we said:

> [W]e believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.

346 So. 2d at 1001. The fact that an adjudication of guilt is a prerequisite, as a technical element of the offense, to a conviction under the habitual offender statute, is thus of no analogous value to the instant case. The word "convicted" as

used in section 921.141(5)(b) means a valid guilty plea or jury verdict of guilty for a violent felony; an adjudication of guilt is not necessary for such a "conviction" to be considered in the capital sentencing character analysis.

The final sentencing issue concerns the appellant's attempt to prove in mitigation under section 921.141(6)(b) that he was under the influence of extreme mental or emotional disturbance at the time the crimes were committed. In our view, the trial judge rejected this mitigating circumstance. The judge noted in his findings of fact that "the mitigating circumstances are very minor" and that the aggravating circumstances "greatly outweigh any mitigating circumstances." As to this specific mitigating circumstance, however, the trial judge remarked that the doctor through whose testimony appellant submitted his proof, "could not with any degree of medical certainty" say that appellant satisfied the criteria of subsection (6)(b). However, it is apparent to us that the jury must have found this mitigating circumstance to exist. There is no other explanation for their advisory verdict in view of the heinous nature of the killing. We find their recommendation has no reasonable basis under the circumstances of this cause.

We realize the advisory recommendation of the jury must be accorded a great weight, Tedder v. State, 322 So. 2d 908 (Fla. 1975), but in our view the decision of the trial judge to impose the death sentence over the jury recommendation of life was in these circumstances proper. Hoy v. State, 353 So. 2d 826 (Fla. 1977); Dobbert v. State, 328 So. 2d 433 (Fla. 1976), aff'd, 432 U.S. 282 (1977), aff'd after Gardner order, 375 So. 2d 1069 (1979).

For the reasons expressed in this opinion, we affirm the appellant's conviction and sentence of death.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., Concur
SUNDBERG, C.J., Concurs specially in result with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SUNDBERG, C.J., Concurring specially in result.

While I concur with the result reached by the majority, I must respectfully register my disagreement with one aspect of the opinion. Based on the authority of Robinson v. State, 373 So.2d 898 (Fla. 1979), and Boykin v. Alabama, 395 U.S. 238 (1969), I agree that a plea of guilty to a violent felony properly may be considered as an aggravating circumstance under section 921.141(5)(b), Florida Statutes (1977). As stated in Boykin, such a plea is more than a confession, "it is itself a conviction." 395 U.S. at 242. Absent any suggestion by the defendant that the plea was involuntarily entered or the pendency of a motion to set it aside, the formality of entry of judgment and imposition of sentence by the Court should not be dispositive of the vitality of the conviction. Where appeal of a conviction is pending at the time of sentencing under chapter 921, however, quite another question is presented. Consequently, I cannot subscribe to the more sweeping statement by the majority which rejects any analogy to the habitual offender statute, section 775.084, Florida Statutes (1975). My reasons for this view are expressed in my dissent in Peek v. State, No. 54,226 (Fla. Oct. 30, 1980), and no useful purpose would be served by repeating them here.

An Appeal from the Circuit Court in and for Lee County,

William Lamar Rose, Judge - Case No. 73-636 CF

Philip M. Gerson of Freshman, Gerson and Freshman, Miami, Florida,

for Appellant

Jim Smith, Attorney General, and Raymond L. Marky, Assistant Attorney General, Tallahassee, Florida,

for Appellee

# Supreme Court of Florida

No. 45,894

JAMES CURTIS McCRAE, Appellant,

v.

STATE OF FLORIDA, Appellee.

[April 9, 1981]

ON REHEARING

PER CURIAM

This cause was initially argued on March 5, 1975. It was subsequently scheduled for reargument on September 20, 1977. Appellant's counsel thereafter requested that this Court relinquish jurisdiction so that he could file a petition for post-conviction relief under Rule of Criminal Procedure 3.850 on the ground that a witness committed perjury during trial. We granted the request and relinquished jurisdiction by our order dated November 29, 1978. After an evidentiary hearing, the trial court denied appellant's petition for post-conviction relief. Appellant filed a notice of appeal on March 8, 1979. The record was received by the Court, but, through inadvertence, the briefs were not made available for Court review. As stated in our original majority opinion, "[a]lthough appellant filed a notice of appeal from that order, he has not informed this Court of the grounds of his attack. Nevertheless, we have reviewed the record of the rule 3.850 proceedings. We are satisfied that the trial judge correctly ruled on the motion and, accordingly, that ruling is affirmed."

On this petition for rehearing, the briefs filed in the post-conviction proceeding have been made available to the Court. Appellant's brief asserts that the trial court erred in finding the witness's testimony at trial to be true and the testimony at the post-conviction hearing to be false. The remaining points are dependent upon this alleged erroneous finding. We have re-reviewed the record of the post-conviction relief proceeding in light of the assertions made in appellant's brief, and we have concluded that the evidence is sufficient to affirm the trial court's finding. Our opinion is corrected to reflect our consideration of the appellant's briefs.

The remaining issues set forth in the petition for rehearing are without merit and are denied.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Lee County,

William Lamar Rose, Judge - Case No. 73-636 CF

Philip M. Gerson of Law Offices of Philip M. Gerson, Miami, Florida,

for Appellant

Jim Smith, Attorney General, and Raymond L. Marky, Assistant Attorney General, Tallahassee, Florida,

for Appellee

# APPENDIX B

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1977

FRIDAY, JUNE 17, 1977

| | | |
|---|---|---|
| JAMES CURTIS McCRAE, | ** | |
| Appellant, | ** | CASE NO. 45,894 |
| vs. | ** | Circuit Court in and for Lee County |
| STATE OF FLORIDA, | ** | 73-636-CF |
| Appellee. | ** | |

The Supreme Court of the United States, in Gardner v. Florida, 45 U.S.L.W. 4275 (March 22, 1977), ruled that it is a denial of due process for the death sentence to be imposed when the trial judge, in weighing the aggravating and mitigating circumstances of the case, considers information which the appellant had no opportunity to deny or explain. To ensure that this Court has all information pertaining to the sentencing process and to avoid collateral applications for relief in reliance on Gardner, the trial judge who imposed the death sentence herein is directed to file a response with this Court within twenty days stating whether he imposed the death sentence in consideration of any information not known to appellant. The trial court is further directed to furnish this Court with any presentence investigation, juvenile case file information, psychiatric reports, or otherwise, which were before it for consideration in imposing sentence.

In the event no such information was used, the trial judge shall so affirmatively state in his response.

Copies of the response, together with copies of any sentencing information, shall be furnished to counsel for the State and counsel for the appellant. If any portion of the information is confidential, counsel for both parties shall maintain its confidentiality until otherwise ordered by this Court.

A True Copy

TEST:

By: Bernice L. Saunders
Chief Deputy Clerk

Sid J. White
Clerk Supreme Court

C
cc: Hon. William Lamar Rose, Judge
Hon. Sal Geraci, Clerk

Hon. Philip M. Gerson
2000 South Dixie Highway, Suite 214
Miami, Florida 33133

Hon. Raymond L. Marky
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

RECEIVED
JUL 13 1977

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1977

JAMES CURTIS McCRAE *

Appellant *

vs *

STATE OF FLORIDA *

Appellee *

CASE NO. 45-894

Circuit Court in and for
Lee County 73-636 CF

* * * * * * * * * * * * * * * * * *

I, WILLIAM LAMAR ROSE, Retired Circuit Judge of the Twentieth Judicial Circuit of Florida and who was presiding Trial Judge in the case of State of Florida vs. James Curtis McCrae, Circuit Court Case No. 73-636-CF, in compliance with the Order entered by the Supreme Court of Florida on June 17, 1977, in Case No. 45,894, being the case of James Curtis McCrae vs State of Florida files this Response as directed, and says:

1.

I, WILLIAM LAMAR ROSE, Trial Judge in State of Florida vs. James Curtis McCrae, Case No. 73-636 CF, Lee County, Circuit Court, did not impose the death sentence upon James Curtis McCrae in consideration of any Information that was not known to James Curtis McCrae and his Attorney.

2.

The Information and factual matters that I, as Trial Judge, considered in the Sentencing process were:

a.

Factual matters gleaned from the evidence presented during the trial.

b.

Factual matters contained in a Presentence Investigation Report ordered by Hon. James R. Adams, Circuit Judge in Case Docket No. 73-372 CF, Lee County Circuit Court, a copy of which was furnished to me as Trial Judge and to Counsel for James Curtis McCrae and to the State Attorney.

LAW OFFICES OF
WILLIAM LAMAR ROSE
P. O. DRAWER 2179
FORT MYERS, FLA.

(NOTE: McCrae was tried by Hon. James R. Adams, Circuit Judge on charge of Assaulting one William R. Smith with a Pistol, with intent to Murder the said William R. Smith, a few months before he murdered Margaret Mears.)

c.

Factual matters contained in the Presentence Investigation Report furnished to Hon. James R. Adams, Circuit Judge, a copy of which was furnished to me, a Trial and Sentencing Judge, as the Presentence Investigation Report in the instant case. Copies of this full report were furnished to Mr. Steven Wallace, Public Defender, Attorney for Defendant; McCrae and to Honorable Joseph D'Alessandro, State Attorney, before the Sentence of McCrae. Copy of Presentence Investigation Report attached hereto and marked Exhibit "A".

d.

No Juvenile Case file Information, Psychiatric Reports or other factual matters were considered by the Court in weighing the Aggravating and Mitigating circumstances in arriving at the conclusion that death was the proper penalty under the law.

This the 11th day of July, 1977.

William Lamar Rose
WILLIAM LAMAR ROSE
CIRCUIT JUDGE RETIRED

I HEREBY CERTIFY that a true and correct copy of the above and foregoing RESPONSE has been furnished to Hon. Philip M. Gerson, 2000 South Dixie Highway, Suite 214, Miami, Florida, 33133 and Hon. Raymond L. Marky, Assistant Attorney General, The Capitol Tallahassee, Florida, 32304, by U. S. Mail, on this the 11th day of July, A. D., 1977.

William Lamar Rose
WILLIAM LAMAR ROSE

LAW OFFICES OF
WILLIAM LAMAR ROSE
P. O. DRAWER 3179
FORT MYERS, FLA.

Law Offices
Philip M. Gerson, P.A.

Suite 214
2000 South Dixie Highway
Miami, Florida 33133
Telephone (305) 854-6552

4 August 1977

Honorable William Lamar Rose
Post Office Drawer 2179
Fort Meyers, Florida

Re: McCray v. State; Supreme Court of Florida - Case No. 45,894

Dear Mr. Rose:

Thank you for sending this office a copy of your affidavit dated 11 July, 1977, filed pursuant to an Order of the Supreme Court.

Enclosed please find a copy of an article published in the Fort Meyers News-Press on January 8, 1975. We now request that you file an affidavit with the Supreme Court within ten (10) days of receipt of this letter in response to the following questions concerning this article:

1. The article states you recently "... sentenced two men to death in the electric chair. Rose, now off the bench, admits there is probably little likelihood the sentences will be carried out, a factor which he said influenced him when he ordered the men to death row."

(a) Is this a correct account of your statement?

(b) If not, did the newspaper misquote you? If so, what was your correct statement?

(c) Was James Curtis McCray one of the two men referred to in the article?

2. The article also states, "Perhaps the most famous incident in Rose's career occurred when the U.S. Supreme Court struck down then-existing death penalties in 1972. Demonstrating his disagreement with the high court,

— APPENDIX (a) —

Judge Rose - wearing a ten gallon hat - stood under a huge oak in front of the Courthouse and tossed a hangman's noose across a limb."

(a) Is this a correct account of the incident?

(b) Was this a political expression of your views on the death penalty?

(c) What other reasons, if any, motivated you to do this?

Please file the original of your affidavit with the Florida Supreme Court and forward copies of your affidavit to this office and to Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida.

Thank you for your cooperation in this matter.

Very truly yours,

Philip M. Gerson

cc: Clerk, Supreme Court
State of Florida
Case No. 45,894

Raymond L. Marky,
Assistant Attorney General

James Curtis McCray

Best Copy Available

News-Press Photo By DAVID BEATTY

ROSE, FLORIDA'S OLDEST CIRCUIT JUDGE, LEAVES LEE COURTHOUSE ... Florida's youngest circuit judge, John Shearer, was sworn in to replace Rose

# Out Goes The Old, In Comes The Young

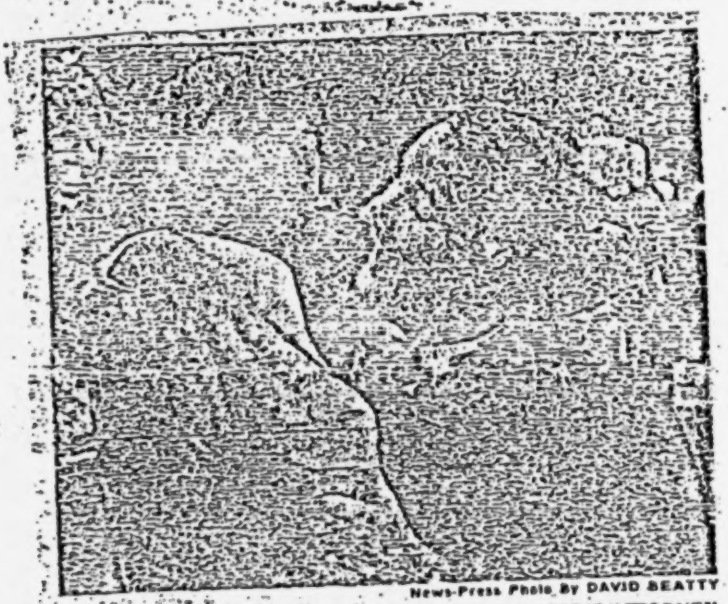
JAN 8 1973

By BILL SLOAT
News-Press Staff Writer

Florida's oldest Circuit Court judge retired Tuesday, and the state's youngest judge was sworn in as his successor in a solemn and brief ceremony in Fort Myers.

Although he has occupied a key role in Southwest Florida's legal profession for nearly 50 years — including eight as a judge — 72-year-old silver-haired William Lamar Rose was in the background.

The day belonged to John Shearer, a 30-year-old Fort Myers attorney elected last fall after a bruising campaign



News-Press Photo By DAVID BEATTY

SHEARER, RIGHT, EMBRACES JOE ADDERDEY, CAPE CORAL ATTORNEY. Adderley was defeated by Ms. Holley in race, she was defeated by Shearer

# Shearer Sworn In

Judge Rose, his black robe tucked under an arm, left the Lee County Courthouse at noon. Judge Shearer went to work.

The second floor courtroom was crowded with attorneys and onlookers as Shearer took the oath of office and promised to "support, protect and defend the Constitution of the United States and the State of Florida."

Fellow Judges Wallace Pack, Thomas Shands, William Nelson and David Orosz presided over the ceremony with balck-robed solemnity.

Judge James Adams, recovering from a major stomach ailment, left his sickbed, donned his robe over his pajamas, and administered the oath to his close friend Shearer.

"I've got my cowboy boots shined, my robe and I'm ready to go to work," the young Judge said. The position carries a salary of $36,000 a year.

Rose, forced into retirement by the Florida Supreme Court because of his age, was philosophical as he chomped on his ever-present cigar.

"I don't know that I have any advice to give [him], except that he should conduct his trials in a manner to find the truth. That's what courts are for, to search for the truth."

Rose's career has been as colorful and controversial as it has been long.

He once was suspended from practice for three months for violation of the code of ethics of the Florida Bar, had occasionally been overruled by higher courts, and was forced off the bench by age.

Judge Rose had vowed to fight the high court ruling, but changed his mind after a traffic accident last summer.

Recently the bushy-eyebrowed judicial veteran again made headlines when he sentenced two men to death in the electric chair. Rose, now off the bench, admits there is probably little likelihood the sentences will be carried out, a factor which he said influenced him when he ordered the men to death row.

"When I finish a sentence, I put it out of my mind. But I had some soul searching moments on those cases," he said. "It was a proper sentence that fitted the crime."

Perhaps the most famous incident in Rose's career occurred when the U.S. Supreme Court struck down then-existing death penalties in 1972. Demonstrating his disagreement with the high court, Judge Rose, wearing a ten gallon hat, stood under a huge oak in front of the courthouse and tossed a hangman's noose across a limb.

Rose was bittersweet about retirement Tuesday. But he's looking forward to a tour around the state as a retired judge assigned to fill in at other towns.

The Judge is scheduled to go to Gainesville later this month.

"I would have liked to have stayed on," he mused in his barren office, with only a few papers for Shearer littering his desk. Only a few short weeks ago Lee County's legal profession had lined up outside the office's oaken door to transact the business of law.

But Tuesday, while Rose was ending his career, the lawyers were upstairs pumping the hand and slapping the back of the new judge, Shearer.

Rose briefly mourned his fall from power.

"I guess, after all is said and done, life moves on. There comes an end to all things, much as we regret it. But that's life, that's living. But after nearly 50 years of being with the law I don't feel like putting what experience I have on the shelf and letting it get dusty."

Best Copy Available

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES CURTIS McCRAY, :

Appellant, : CASE NO. 45,894

vs. :

STATE OF FLORIDA, :

Appellee. :

AFFIDAVIT AND SWORN STATEMENT OF BILL SLOAT

STATE OF FLORIDA )
) ss.:
COUNTY OF LEE )

Before me, the undersigned authority, personally appeared BILL SLOAT, who, after being duly sworn, deposes and says:

1. That he is a reporter for the Fort Meyers News-Press.

2. That he wrote the article concerning Judge William Lamar Rose's retirement which appeared in the Fort Meyers News-Press on January 8, 1975 at page 1A.

3. That the said article contained the following paragraph:

> Recently the bushy-eyebrowed judicial veteran again made headlines when he sentenced two men to death in the electric chair. Rose, now off the bench, admits there is probably little likelihood the sentences will be carried out, a factor which he said influenced him when he ordered the men to death row.

4. That the above-quoted paragraph is an accurate and truthful paraphrase of statements made by Judge Rose to the affiant.

//

5. That the article concerning Judge Rose also contained the following paragraph:

> "Perhaps the most famous incident in Rose's career occurred when the U.S. Supreme Court struck down then-existing death penalties in 1972. Demonstrating his disagreement with the high court, Judge Rose - wearing a ten-gallon hat - stood under a huge oak in front of the courthouse and tossed a hangman's noose across a limb."

6. That the above-quoted paragraph is an accurate and correct account of the event therein described.

FURTHER AFFIANT SAYETH NOT.

Bill Sloat
BILL SLOAT

Sworn to and Subscribed
before me this 16 day
of August, 1977.

Notary Public

My Commission Expires:

///

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES CURTIS McCRAY, :

Appellant, :

vs. : CASE NO. 45,894

STATE OF FLORIDA, :

Appellee. :

AFFIDAVIT AND SWORN STATEMENT OF
PHILIP M. GERSON

STATE OF FLORIDA )
) ss.:
COUNTY OF DADE )

Before me, the undersigned authority, personally appeared PHILIP M. GERSON, who, after being duly sworn, deposes and says:

1. That he is an attorney duly licensed and practicing in the State of Florida.

2. That on August 4, 1977, he sent a letter to the Honorable William Lamar Rose concerning statements in an article which appeared in the Fort Meyers News-Press on January 8, 1975 and asking that Judge Rose respond to the above Court within ten days.

3. To date no response has been received from Judge Rose.

FURTHER, AFFIANT SAYETH NOT.

PHILIP M. GERSON

Sworn to and Subscribed
before me this 9th
day of Sept., 1977.

Notary Public

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES ... 18, 1978
BONDED THRU GENERAL INSURANCE UNDERWRITERS

# APPENDIX C

IN THE SUPREME COURT OF THE STATE OF FLORIDA

| | | |
|---|---|---|
| JAMES CURTIS McCRAY, | : | CASE NO. 45,894 |
| Appellant, | : | |
| vs. | : | MOTION FOR DETERMINATION OF APPEAL |
| STATE OF FLORIDA, | : | |
| Appellee, | : | |
| | : | |

COMES NOW, the Appellant, and moves this Honorable Court for entry of an Order and Opinion adjudicating the issues raised in his Appeal, and would show unto the Court, that:

1. JAMES CURTIS McCRAY was convicted of first degree murder and sentenced to be executed in the electric chair by Final Judgment dated May 21, 1974.

2. An Appeal was taken directly to the Florida Supreme Court, pursuant to the applicable Statute and Oral Argument was heard on March 5, 1975.

3. On the Motion of the Court, further Oral Argument was held on September 20, 1977.

4. Through and including the present date, there has been no determination of this Appeal by the Court.

5. JAMES CURTIS McCRAY has been on death row since a date shortly after the entry of the Order sentencing him.

WHEREFORE, Appellant respectfully requests entry of an Order adjudicating the issues he has raised in his Appeal.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing MOTION FOR DETERMINATION OF APPEAL was mailed to the HONORABLE ROBERT SHEVIN, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida, this 18th

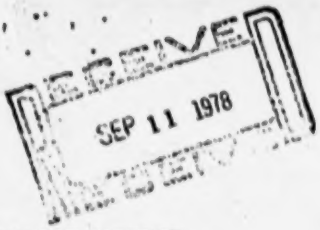


FRESHMAN, GERSON & FRESHMAN, P.A., 2000 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33133, TELEPHONE 854-6552

day of August, 1978.

FRESHMAN, GERSON & FRESHMAN, P.A.
Attorneys for Appellant
2000 South Dixie Highway, Suite 205
Miami, Florida 33133

BY: _____
PHILIP M. GERSON




IN THE SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 7, 1978

JAMES CURTIS McCRAE,

Appellant,

vs.

CASE NO. 45,894

STATE OF FLORIDA,

Appellee.

* * * * * * * * * * * * * * * * * * * *

Motion for Determination of Appeal, filed by the Appellant in the above styled cause, is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

R

cc: Philip M. Gerson, Esquire
Raymond L. Marky, Esquire

# APPENDIX D

IN THE SUPREME COURT OF THE STATE OF FLORIDA

| | | |
|---|---|---|
| JAMES CURTIS McCRAY, | : | CASE NO. 45,894 |
| Appellant, | : | |
| vs. | : | MOTION FOR NEW TRIAL |
| STATE OF FLORIDA, | : | |
| Appellee, | : | |
| | : | |
| | : | |

COMES NOW, the Defendant, by and through his undersigned attorney, and moves this Honorable Court for the entry of an Order, granting a New Trial, pursuant to Rule 3.600 of the Florida Rules of Criminal Procedure, and as grounds, Defendant would show unto the Court, that:

1. New and material evidence, which if introduced at the trial, would probably have changed the verdict or finding of the Court, has been discovered.

2. Defendant could not, with reasonable diligence, have discovered and produced this evidence upon the trial of this cause.

3. At Defendant's trial for the first degree murder of Margaret Mears, the State presented testimony of Otis Walker, who made a positive identification of the Defendant, and stated that he observed the Defendant within several blocks of the place where the murder occurred, at or near the time at which the murder occurred. Otis Walker testified further that he observed the Defendant wearing a cast on his arm at the time and place he observed the Defendant.

4. The aforesaid testimony from Otis Walker was in fact, false and untrue as is set forth in the attached Affidavit, which is hereby incorporated by reference and made a part hereof.



LAW OFFICES OF PHILIP M. GERSON, P.A. SUITE 314 • 2020 SOUTH DIXIE HIGHWAY MIAMI, FLORIDA 33133 854-6552

5. The aforesaid false and untrue testimony was purposely and deliberately elicited and presented by the State when, in fact, the State and its agents, knew that said testimony was false and untrue, as is more fully set forth in the attached Affidavit, which is hereby incorporated and made a part hereof.

6. Recently, Defendant's family members came into contact with the aforesaid Otis Walker, and learned of the facts set forth hereinabove from Otis Walker. Defendant, despite the use of reasonable diligence, was unable to discover this evidence prior to this time, because Otis Walker had never previously acknowledged the false and untruthful nature of his testimony.

7. The testimony of Otis Walker is material, in that there were no witnesses to the commission of the crime; Defendant's conviction was supported only by circumstantial evidence; and Otis Walker's testimony contradicted Defendant's alibi evidence that he was not in the area at the time the crime was committed.

8. The aforesaid conviction of the Defendant, based upon this testimony together with the knowing and understanding use of this perjured testimony by the State, constitutes a denial of the Defendant's procedural and substantive rights to due process of the law. Anderson v. United States, 403 F. 2d 451, 454 (7th Cir. 1968), cert. den., 394 U.S. 903 (1969).

WHEREFORE, Defendant respectfully moves this Court for entry of an Order granting a New Trial.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing MOTION FOR NEW TRIAL was mailed to the Honorable ROBERT SHEVIN, Attorney General, The Capitol, Tallahassee, Florida, this 22nd day of November, 1977.

LAW OFFICES OF PHILIP M. GERSON, P.A.
Attorney for Appellant
2000 South Dixie Highway, Suite 214
Miami, Florida 33133 (305) 854-6552

BY: _____
PHILIP M. GERSON

(State of Florida)
(County of Lee)

To whom it may concern;

This is to state that i Otis Walker was arrested October 18,1973 the date whenOctober 12,1973 Margaret Mills was killrd I knew nothing of it.The two arresting officers that arrested James C. McCray Came foward to me and asked if i knew James C. McCray and i answered yes. I was then asked if i wantwed to make a deal in the Court Room to testify against James C. McCray and my answer was NO.

At this point i was put in isolation ,withthe same arresting officers coming time after time to work a deal on my caseto testify against James C. McCray. Wwn i failed to agree to testify i was put through cruel and and unusual punishment, i was beat and the lack pf proper food.
After so long in this condiation i could not stand this any longer so i testified Falsely against James C. McCray to be relieved of this punishment.

I was taken to the site of the murderand shown the building and the surroundings by Deputy Bernard Moore and a white Deputy. I was told that a deal would be made anyway if i did not mention what happened with reguards to the punishment.

In the end there was no deal,and i was told not to mention nothing of the punishment or the deal if i did i would be made to suffer more.

I did not see James C. McCray commit murder on any date nor did i see the area until taken there by the deputies.

Witness Artis Smith

Witness Willie T Williams

Otis Walker

Otis Walker

Before this day personally appeared Otis Walker who being first duly sworn, desposes and says the facts above are true to the best of his knowledge. sworn to and subscribed to before me this 7th day of November 1977.

Holaven N. Barnett

Notary Public

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT 22 1981
BONDED THRU GENERAL INS. UNDERWRITERS

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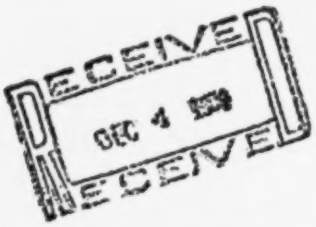
NOV 14 1977

# Supreme Court of Florida




No. 45,894

JAMES CURTIS McCRAE, Appellant,
vs.
STATE OF FLORIDA, Appellee.

November 29, 1978

ORDER

This cause is before the Court to review a judgment of guilty of murder in the first degree and sentence of death imposed thereon entered by the Circuit Court of the Twentieth Judicial Circuit for Lee County, Florida. Oral argument was presented on September 20, 1977. On November 28, 1977, appellant filed in this Court, inter alia, a motion for new trial with supporting affidavit pursuant to Florida Rules of Criminal Procedure 3.600 alleging newly discovered evidence. In the affidavit supporting the motion, a material witness at the trial of the appellant avers under oath essentially that he testified falsely at the trial of the appellant; that his testimony at trial was induced through punishment and coercion; and that the witness was offered a "deal" in exchange for his testimony at trial. The record of the cause reflects that the witness denied under oath at trial that any inducement was offered for his testimony. Appellant contends that these allegations establish a violation of Brady v. Maryland, 373 U.S. 83 (1963), and, accordingly, that he is entitled to a new trial. The appellee has filed a reply in opposition to

appellant's motion. In its reply the State correctly points out that a motion for new trial under Rule 3.600 is properly to be addressed to the trial court and is an inappropriate pleading in the appellate court.

In addition to the fact that appellant's motion pursuant to Rule 3.600 is inappropriately filed in this Court, such a motion would now be improper in the trial court as well because the time limits for filing this motion have expired. See Florida Rules of Criminal Procedure 3.590(a). At the expiration of the time periods contained in Rule 3.590(a), the appropriate means of seeking to remedy an alleged Brady violation is a Motion to Vacate Judgment and Sentence under Florida Rules of Criminal Procedure 3.850. However, this motion is likewise an inappropriate pleading in the appellate court.

Nonetheless, after consideration of the arguments of appellant and appellee, we determine that the ends of justice and judicial economy in this case dictate that appellant's motion be treated as one requesting this Court to relinquish jurisdiction to enable him to seek relief in the trial court. Accordingly, it is ordered that jurisdiction of this cause is relinquished to the Circuit Court of the Twentieth Judicial Circuit for Lee County, Florida, to permit appellant to file a Motion to Vacate Judgment and Sentence pursuant to Florida Rules of Criminal Procedure 3.850, raising the claim of a Brady violation. Such motion shall be filed within twenty (20) days from the date of this Order, otherwise the issue shall be deemed waived by appellant and jurisdiction shall revert to this Court for consideration of the remaining issues on appeal. Upon the timely filing of such a motion by appellant and in considering and disposing of this issue, the trial judge is directed to apply the standard enunciated in United States v. Agurs, 427 U.S. 97, 103-104 (1976), and Giglio v. United States, 405 U.S. 150, 154 (1972).

It is so ordered.

ENGLAND, C.J., BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur
ADKINS, J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. William Lamar Rose, Judge
Hon. Sal Geraci, Clerk

Philip M. Gerson, Esquire
2000 South Dixie Highway
Suite 214
Miami, Florida 33133
Raymond L. Marky, Esquire
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

PMG:as 12/15/78

IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CASE NO. 73-636 CF

STATE OF FLORIDA,

Plaintiff

vs.

JAMES CURTIS McCRAY,

Defendant,

MOTION TO VACATE AND SET ASIDE CONVICTION AND SENTENCE

COMES NOW, the Defendant, JAMES CURTIS McCRAY, by and through his undersigned attorney, and moves this Honorable Court for the entry of an Order vacating and setting aside the judgment of conviction and sentence pursuant to Rule 3.850 and would show unto the Court that:

1. Petitioner was convicted and sentenced by the Circuit Court for the 20th Judicial Circuit located in Lee County, Ft. Myers, Florida.

2. Judgment of conviction was entered on the 21st day of May, 1974.

3. Petitioner was sentenced to death.

4. Petitioner was convicted of first degree murder.

5. Petitioner pled not guilty.

6. The case was tried by a jury on both the issues of guilt or innocence and on sentencing.

7. Petitioner testified at trial.

8. Petitioner appealed from the judgment of conviction and from the sentence.

9. The Appeal was taken to the Florida Supreme Court. The Appeal has not been decided by the Florida Supreme Court.

10. Petitioner filed a Motion for New Trial in this Court contemporaneously with an identical Motion filed in the Florida Supreme Court.

11. The Motion for New Trial was based upon the use perjured testimony by one OTIS WALKER, and upon the failure

of the State to disclose to the defense the promises of immunity made to OTIS WALKER and coercion of OTIS WALKER in order to obtain his testimony. There has been no evidentiary hearing on the Motion for New Trial.

12. At the trial of this cause, the State presented testimony of OTIS WALKER who made a positive identification of the Defendant and testified that he observed Defendant within several blocks of the place where the crime occurred, at or near the time the crime was committed. OTIS WALKER testified further that he observed Defendant wearing a cast on his arm at the time and place he observed Defendant.

13. Agents of the State, including BERNARD MOORE, knew that OTIS WALKER's testimony was false and coerced him to give such testimony despite this knowledge. OTIS WALKER was taken into custody and physically beaten and mistreated by agents of the State until he agreed to give false testimony against the Defendant herein. The State failed to disclose these facts to the Defendant or his counsel.

14. In the fall of 1977, members of Defendant's family came into contact with OTIS WALKER at which time the above-recited facts were disclosed to them.

15. The testimony of OTIS WALKER was material and prejudicial in that there were no eye-witnesses to the crime for which Defendant stands convicted. Defendant's conviction was obtained solely by circumstantial evidence. The testimony of OTIS WALKER was instrumental in obtaining Defendant's conviction in that the said testimony placed the Defendant in the vicinity of the scene of the crime at the time the crime was committed. Moreover, said testimony directly contradicts Defendant's alibi evidence that he was elsewhere at the time of the commission of the crime.

16. Evidence of the coercion and promises made to OTIS WALKER together with the statements contained in the Affidavit of OTIS WALKER, would probably have changed the verdict and finding of guilt made by the Court.



FRESHMAN, GERSON & FRESHMAN, P.A., 2000 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33133, TELEPHONE 854-6552

17. The Defendant could not, with reasonable diligence and discovery, produce at trial the evidence concerning the promises and coercion made to and upon OTIS WALKER.

18. At the present time, there is an Appeal of the judgment and sentence now pending before the Florida Supreme Court. The grounds for the appeal are that:

a. The trial court erred in allowing the State to question Defendant about a previous unrelated felony.

b. The trial court erred in admitting the testimony of Edith Veal, Muriel Bergner, Faith Gertner and William Smith.

c. The trial court erred in imposing the death penalty under the mandate of Furman v. Georgia, because no rational distinction exists between first degree murder and second degree murder pursuant to F.S. 782.04(1)(a) and F.S. 782.04(2).

d. Florida Statutes §921.141 violates the 8th and 14th amendments to the United States Constitution under the mandate of Furman v. Georgia, on its face and as applied to the Defendant.

e. The trial court erred in overruling the advisory verdict of the jury for a life sentence and imposing the death sentence.

These issues were raised in Briefs and in oral argument. At this time, no adjudication has been made.

19. In all proceedings through and including the imposition of sentence, the Defendant was represented by attorney Joseph Simpson, c/o the Lee County Public Defender's Office in Ft. Myers, Florida. On Appeal and in the Motion for New Trial, Defendant has been represented by Philip M. Gerson, Esq., 2000 South Dixie Highway, Suite 205, Miami, Florida 33133.

20. Attached hereto and made a part hereof is the Order of November 29, 1978 of the Florida Supreme Court and the Affidavit of Otis Walker. The original acknowledged copy of OTIS WALKER's Affidavit was filed in the Florida Supreme Court on or about November 22, 1977.

WHEREFORE, Petitioner prays that this Court grant all relief to which he may be entitled in this proceeding, including, but not limited to vacating and setting aside the Judgment of



FRESHMAN, GERSON & FRESHMAN, P.A., 2000 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33133, TELEPHONE 854-6552

Conviction and imposition of sentence and further. the Petitioner be granted a New Trial on all issues. Petitioner further prays that he be declared insolvent for the purposes of these proceedings and all future proceedings, and further prays that his undersigned attorney be appointed by the Court to represnt him in this and all further proceedings and that the Court grant such other and further relief as it deems just and proper.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing MOTION TO VACATE AND SET ASIDE CONVICTION AND SENTENCE was mailed to the HON. RAYMOND L. MARKY, ASSISTANT ATTORNEY GENERAL, the Capitol, Tallahassee, Florida 32304, and to the Office of the Lee County State Attorney, Lee County Courthouse, Ft. Myers, Florida, this 15th day of December, 1978.

FRESHMAN, GERSON & FRESHMAN, P.A.
Attorneys for Defendant
2000 South Dixie Highway, Suite 205
Miami, Florida 33133

BY: _____
PHILIP M. GERSON

STATE OF FLORIDA )
) SS:
COUNTY OF DADE )

BEFORE ME, the undersigned authority, duly authorized to take acknowledgments and administer oaths, personally appeared PHILIP M. GERSON, who, after being duly sworn upon oath, deposes and states that he is the attorney for the Defendant herein, and files this Motion from facts and matters which are within his knowledge, and that to the best of his knowledge and belief, the above and foregoing is true and correct.

SWORN TO AND SUBSCRIBED before me, this _____ day



FRESHMAN, GERSON & FRESHMAN, P.A., 2000 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33133, TELEPHONE 854-6552

of December, 1978, at Miami, Dade County, Florida.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE

My Commission Expires: NOTARY PUBLIC STATE OF FLORIDA AT LARGE MY COMMISSION EXPIRES OCT. 9 1982 BONDED THRU GENERAL INS. UNDERWRITERS

STATE OF FLORIDA )
) SS:
COUNTY OF BRADFORD )

BEFORE ME, the undersigned authority, duly authorized to take acknowledgments and administer oaths, personally appeared JAMES CURTIS McCRAY, who, after being duly sworn upon oath, deposes and states that he is the Petitioner in the above-styled proceedings; that he has read the above and foregoing Motion, and that to the best of his knowledge and belief, the facts and matters contained therein are true and correct.

JAMES CURTIS McCRAY

SWORN TO AND SUBSCRIBED before me, this _____ day of December, 1978, at Starke, Bradford County, Florida.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE

My Commission Expires:

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA — CRIMINAL ACTION

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STATE OF FLORIDA,
Plaintiff,
-vs-
JAMES CURTIS McCRAY,
Defendant.

CASE NO. 73-636-CF

O R D E R

THIS CAUSE came on to be heard on the Motion to Vacate and Set Aside Conviction and Sentence filed by the Defendant, JAMES CURTIS McCRAY, through his counsel, PHILIP M. GERSON, on the 18th day of December, 1978. The undersigned, after hearing the evidence presented by the parties in support and in opposition to the allegations made in the Motion to Vacate and Set Aside Conviction and Sentence and after having heard the argument of counsel and having reviewed the authorities cited therein and further, having reviewed the entire trial transcript in this matter and being otherwise fully advised in the premises, is of the opinion that the Defendant's motion should be, and is, hereby denied.

It is the Court's opinion that the testimony of OTIS WALKER presented to this Court in support of the allegations in the Motion to Vacate and Set Aside Conviction and Sentence is totally and wholly unbelievable. The Court specifically finds that the testimony before this Court of OTIS WALKER in support of the above motion is, in fact, untrue. The Court, further, specifically finds that the State committed no Brady[1] violations and that applying the standards annunciated in United States v. Agurs, 427 U.S. 97, 103-104 (1976), and Giglio v.

[1] Brady v. Maryland, 373 U.S. 83 (1963)

United States, 405 U.S. 150, 154 (1972), denies the relief requested by the Defendant and as such; it is thereupon,

ORDERED AND ADJUDGED that the Motion to Vacate and Set Aside Conviction and Sentence filed in this Court on December 18, 1978, by the Defendant, JAMES CURTIS McCRAY, through his counsel is denied.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 2nd day of February, 1979.

John H. Shearer, Jr.
Circuit Judge

cc: Philip M. Gerson, Attorney for Defendant McCray
Marshall King Hall, Assistant State Attorney

# APPENDIX E

## APPENDIX C

### DEATH SENTENCES IMPOSED IN FLORIDA AFTER JURY PENALTY VERDICTS OF LIFE IMPRISONMENT, 1973-1981

In the list which follows, the abbreviation "FSC" means the Florida Supreme Court, while "USSC" means United States Supreme Court. Each individual sentenced to death is listed only once, although in some cases more than one death sentence may have been imposed on a single defendant for different offenses, and in other cases a death sentence may have been imposed, reversed, and then reimposed. Under Gardner v. Florida, 430 U.S. 349 (1977), a number of death sentences have been remanded to the trial court in order to give the accused an opportunity to rebut or respond to any previously undisclosed material considered in imposing the original sentence of death. Such a remand does not, of course, invalidate the jury's penalty verdict.

| | |
|---|---|
| 1. Elwood Barclay (B) | FSC upheld 3-17-77. Remanded for resentencing by FSC per Gardner 9-7-78. Resentenced to death 4-18-80. |
| 2. Henry Brown (B) | FSC reduced to 25-year life 2-1-79 |
| 3. Franz Buckrem (W) | FSC reduced to 25-year life 1-26-78. |
| 4. Jackson Burch (B) | FSC reduced to 25-year life 3-10-77. |
| 5. Walter Carnes (B) | Committed suicide on death row. Case dismissed by FSC, 7-15-75. |
| 6. Glen Chambers (W) | FSC reduced to 25-year life 11-4-76. |
| 7. Ernest John Dobbert, Jr. (W) | FSC upheld 1-14-76. USSC upheld 6-15-77. FSC remanded for resentencing per Gardner, 4-2-78. Resentenced to death 6-78. FSC upheld second death sentence 7-5-79. Cert. den. 6-9-80. |
| 8. Howard Virgil Lee Douglas (W) | FSC upheld 2-18-76. Cert. den. 4-77. Death warrant signed 7-17-79. Federal stay 7-24-79. |
| 9. Daniel Wilbur Gardner (W) | FSC upheld 2-26-75. USSC reversed 3-22-77 (Gardner v. Florida). Resentenced to 25-year life 5-77. |
| 10. Jesse Lamar Hall (W) | FSC remanded for new trial 12-20-79. Allowed to plead guilty and receive 25-year life, 6-80. |
| 11. Darrell Hoy (W) | FSC upheld 12-2-77. Granted executive clemency 6-12-80. |
| 12. Sonia Jacobs (W) | FSC reduced to 25-year life 3-26-81. |
| 13. Jimmie Lee Jones (B) | FSC reduced to 25-year life 5-12-76. |
| 14. Robert Fieldmore Lewis (W) | FSC remanded for resentencing 4-2-81. |
| 15. James McCaskill (B) | FSC reduced to 25-year life 4-7-77. |

16. James McCray (B) — FSC upheld 10-30-80.

17. Rodney Malloy (W) — FSC reduced to 25-year life 12-20-79.

18. Jack Neary (W) — FSC reduced to 25-year life 5-15-80.

19. Eddie Odom (W) — First review in FSC pending.

20. Michael Provence (W) — FSC reduced to 25-year life 7-21-76.

21. Anthony Eugene Sawyer (B) — FSC upheld 2-19-75. Trial judge subsequently reduced to 25-year life 8-6-76.

22. William Horace Shue (W)* — FSC reduced to 25-year life 12-8-78.

23. Darius Slater (B) — FSC reduced to 25-year life 6-25-75.

24. Joe Spaziano (W) — FSC remanded for resentencing 1-8-81.

25. Lloyd Swan (B) — FSC reduced to 25-year life 9-3-75.

26. Joseph Taylor (B) — FSC reduced to 25-year life 5-15-75.

27. Mack Reed Tedder (W) — FSC reduced to 25-year life 11-19-75.

28. Larry Thompson (W) — FSC reduced to 25-year life 1-21-76.

29. Ernest Coyle Walker (W) — Died on death row 3-17-77. Possible suicide.

30. Clifford Williams (B) — FSC reduced to 25-year life 6-12-80.

31. Otis Williams (B) — FSC reduced to 25-year life 4-7-77.

32. William Thomas Zeigler (W) — First review in FSC pending.

DEATH SENTENCES IMPOSED IN FLORIDA AFTER JURY PENALTY VERDICTS OF LIFE IMPRISONMENT SINCE 9-11-77:

33. Alonzo Winfred Bryant (B)
Sentence imposed 11-22-77. — First review in FSC pending.

34. John William Barfield (W)
Sentence imposed 3-3-78. — First review in FSC pending.

35. Robert Lewis Buford (B)
Sentence imposed 3-31-78. — First review in FSC pending.

36. Roy McKennon (B)
Sentence imposed 4-21-78. — First review in FSC pending.

37. James L. Phippen (W)
Sentence imposed 6-22-78. — FSC reduced to 25-year life 10-23-80.

38. Beauford White (B)
Sentence imposed 6-22-78. — FSC upheld 3-20-81.

39. David Monroe Goodwin (W)
Sentence imposed 8-18-78. — First review in FSC pending.

*Death sentence of William Horace Shue was imposed for sexual battery upon a child which did not result in the death of the victim, an offense punishable by death or life imprisonment without opportunity for parole during the first 25 years of the sentence, see Section 794.011 (2), Florida Stats. (1977).

40. Durham Eldon Stokes (W) — First review in FSC pending.
Sentence imposed 8-25-78.

41. William Glenn Welty (W) — First review in FSC pending.
Sentence imposed 10-31-78.

42. Raleigh Porter (W) — First review in FSC pending.
Sentence imposed 12-11-78.

43. Guy Ennis Smith (W) — First review in FSC pending.
Sentence imposed 12-21-78.

44. Marvin Edwin Johnson (W) — FSC upheld 12-11-80.
Sentence imposed 1-12-79.

45. Robert D. Heiney (W) — First review in FSC pending.
Sentence imposed 3-29-79.

46. Thomas McCampbell (B) — First review in FSC pending.
Sentence imposed 4-24-79.

47. Soloman Webb (B) — First review in FSC pending.
Sentence imposed 11-16-79.

48. William Howe Gilvin (W) — First review in FSC pending.
Sentence imposed 1-4-80.

49. Bernard Bolander (W) — First review in FSC pending.
Sentence imposed 4-25-80.

50. Donald Albert Walsh (W) — First review in FSC pending.
Sentence imposed 6-26-80.

51. Gregory Scott Engle (W) — First review in FSC pending.
Sentence imposed 8-17-79.

52. Rufus Stevens (W) — First review in FSC pending.
Sentence imposed 8-17-79.

53. Earnest Lee Miller (W) — First review in FSC pending.
Sentence imposed 1-30-80.

54. Michael E. Canady (W). — First review in FSC pending.
Sentence imposed 6-20-80.

55. Bobby Earl Lusk (W) — First review in FSC pending.
Sentence imposed 2-5-80.

56. Gregory Mills (B) — First review in FSC pending.
Sentence imposed 4-18-80.

57. Ervin McCray (B) — First review in FSC pending.
Sentence imposed 8-25-80.

58. Ricky Washington (B) — First review in FSC pending.
Sentence imposed 9-15-80.

59. Dan Edward Routly (W) — First review in FSC pending.
Sentence imposed 11-24-80.

60. Connie Livingston (B) — First review in FSC pending.
Sentence imposed 10-10-80.

61. Durwin Norris — First review in FSC pending.
Sentence imposed 3-12-81.

NOTE: Letters after names show race of defendant: (B)=Black, (W)=White.

Under Section 775.082 (1) (Florida Stats., 1977), the only available penalties for first degree murder or sexual battery on a child are death or life imprisonment without opportunity for parole during the first 25 years of the sentence. In this list, the sentence provided as an alternative to the death penalty is referred to as "25-year life."

# APPENDIX F

APPENDIX D

DEATH SENTENCES IMPOSED IN FLORIDA AFTER JURY PENALTY VERDICTS OF LIFE IMPRISONMENT; CURRENT DISPOSITIONS

In the list which follows, the abbreviation "FSC" means Florida Supreme Court, while "USSC" means United States Supreme Court. In some of these cases, death sentences have been vacated by the Florida Supreme Court and then reimposed on remand by the trial judge after a "Gardner hearing" where the accused may rebut or respond to any previously undisclosed material used as a basis for the original death sentence, see Gardner v. Florida, 430 U.S. 349, 357 (1977).

A. Under Death Sentence Affirmed By FSC

| | |
|---|---|
| 1. Howard Virgil Lee Douglas | FSC Affirmed: Douglas v. State, 328 So.2d 18 (1976); FSC Denied Post-Conviction Relief: Douglas v. State, 373 So.2d 895 (1979). |
| 2. Ernest John Dobbert, Jr. | FSC Affirmed: Dobbert v. State, 328 So.2d 433 (1976); USSC Affirmed: Dobbert v. Florida, 432 U.S. 282 (1977); FSC Affirmed on resentencing after Gardner hearing and new death sentence from trial court: Dobbert v. State, 375 So.2d 1069 (1979). |
| 3. Elwood Clark Barclay | FSC Affirmed: Barclay v. State, 343 So.2d 1266 (1977); now under resentence of death after Gardner hearing; direct review by FSC pending. |
| 4. James McCray | FSC Affirmed: McCrae v. State, ___ So.2d ___ (Case No. 45894, Oct. 30, 1980; rehearing denied April 9, 1981). |
| 5. Marvin Edwin Johnson | FSC Affirmed, Johnson v. State, 393 So.2d 1069 (1980). |
| 6. Beauford White | FSC Affirmed, White v. State, ___ So.2d ___ (Case No. 54292, March 20, 1980). |

B. Death Sentenced Reversed By USSC After FSC Affirmance, Then Reduced To Life Imprisonment By Florida Courts.

| | |
|---|---|
| 7. Daniel Wilbur Gardner | FSC Affirmed: Gardner v. State, 313 So.2d 675 (1975); USSC Reversed: Gardner v. Florida, 430 U.S. 349 (1977). |

C. Death Sentence Reduced To Life Imprisonment by Trial Judge After FSC Affirmance

8. Anthony Eugene Sawyer — FSC Affirmed: Sawyer v. State, 313 So.2d 680 (1975); Reduced by trial judge, Aug. 1976.

D. Death Sentence Reduced To Life Imprisonment By Executive Clemency After FSC Affirmance

9. Darrell Edwin Hoy — FSC Affirmed: Hoy v. State, 353 So.2d 826 (1977); executive clemency granted, June 12, 1980.

E. Death Sentence Reduced To Life Imprisonment By FSC

10. Joseph Taylor — FSC Reduced: Taylor v. State, 294 So.2d 648 (1974).

11. Darius Slater — FSC Reduced: Slater v. State, 316 So.2d 539 (1975).

12. Lloyd Swan — FSC Reduced: Swan v. State, 322 So.2d 485 (1975).

13. Mack Reed Tedder — FSC Reduced: Tedder v. State, 322 So. 908 (1975).

14. Larry Thompson — FSC Reduced: Thompson v. State, 328 So.2d 1 (1976).

15. Jimmie Lee Jones — FSC Reduced: Jones v. State, 332 So.2d 615 (1976).

16. Michael Edward Provence — FSC Reduced: Provence v. State, 337 So.2d 783 (1976).

17. Glen Stark Chambers — FSC Reduced: Chambers v. State, 339 So.2d 204 (1976).

18. Jackson Burch — FSC Reduced: Burch v. State, 343 So.2d 831 (1977).

19. James McCaskill — FSC Reduced: McCaskill v. State, 344 So.2d 1276 (1977).

20. Otis Williams — FSC Reduced: Williams v. State, 344 So.2d 1276 (1977).

21. Franz Peter Buckrem — FSC Reduced: Buckrem v. State, 355 So.2d 111 (1978).

22. William Horace Shue, Jr. — FSC Reduced: Shue v. State, 366 So.2d 387 (1978).

23. Henry Brown — FSC Reduced: Brown v. State, 367 So.2d 616 (1979).

24. Rodney Malloy — FSC Reduced: Malloy v. State, 382 So.2d 1190 (1979).

25. Jack Neary — FSC Reduced: Neary v. State, 384 So.2d 881 (1980).

26. Clifford Williams, Jr. — FSC Reduced: Williams v. State, 386 So.2d 536 (1980).

27. James Leroy Phippen — FSC Reduced: Phippen v. State, 389 So.2d 991 (1980).

28. Sonia Jacobs — FSC Reduced: Jacobs v. State, ___ So.2d ___ (Case No. 50175, March 26, 1981).

F. Death Sentence Remanded To Trial Court For Reconsideration After FSC Reversal

29. Joseph Robert Spaziano — FSC Remanded For Resentencing: Spaziano v. State, 393 So.2d 1119 (1981).

30. Robert Fieldmore Lewis — FSC Remanded For Resentencing: Lewis v. State, ___ So.2d ___ (Case No. 50851, April 2, 1981).

G. Conviction Reversed By FSC, Defendant Permitted On Retrial To Plead Guilty And Receive Life Sentence

31. Jesse Lamar Hall — FSC Reversed Conviction: Hall v. State, 381 So. 2d 683 (1979); pled guilty on retrial and received life sentence, June, 1980.

H. Death Sentence Pending First Review In FSC

32. Eddie Odom

33. Alonzo Winfred Bryant

34. John William Barfield

35. Roy McKennon

36. David Monroe Goodwin

37. Durham Eldon Stokes

38. William Glenn Welty

39. William Thomas Zeigler

40. Raleigh Porter

41. Guy Ennis Smith

42. Robert D. Heiney

43. Thomas McCambell

44. Gregory Scott Engle

45. Rufus Stevens

46. Robert Lewis Buford

47. Solomon Webb

48. Bernard Bolander

49. William Howe Gilvin

50. Donald Albert Walsh

51. Earnest Lee Miller

52. Michael E. Canady

53. Bobby Earl Lusk

54. Gregory Mills

55. Ervin McCray

56. Ricky Washington

57. Dan Edward Routly

58. Connie Livingston

59. Durwin Norris

I. Suicide Or Possible Suicide While Under Death Sentence Before First Review Of Sentence In FSC Was Decided

60. Walter Carnes — Committed suicide, 1975; See Carnes v. State, Case No. 46,673, motion to dismiss filed July 14, 1975, and order entered July 15, 1975.

61. Ernest Coyle Walker — Possible suicide, March 1977; cause of death uncertain, and accident or homicide not excluded.

## SUMMARY OF CASE DISPOSITIONS

### Florida Death Sentences After Jury Life Verdicts

A. Under Death Sentence Affirmed By FSC----------6*

B. Death Sentence Reversed By USSC After FSC Affirmance, Then Reduced To Life Imprisonment By Florida Courts----------1

C. Death Sentence Reduced To Life Imprisonment By Trial Judge After FSC Affirmance----------1

D. Death Sentence Reduced To Life Imprisonment By Executive Clemency After FSC Affirmance----------1

E. Death Sentence Reduced To Life Imprisonment By FSC-------19

F. Death Sentence Remanded To Trial Court For Reconsideration After FSC Reversal----------2*

G. Conviction Reversed By FSC, Defendant Permitted On Retrial To Plead Guilty And Receive Life Sentence---------1

H. Death Sentence Pending First Review In FSC----------28*

I. Suicide Or Possible Suicide While Under Death Sentence Before First Review Of Sentence In FSC Was Decided--------2

TOTAL NUMBER OF CASES 61

TOTAL NUMBER OF PERSONS POTENTIALLY AFFECTED 36*

(Categories marked (*) are potentially affected by Petitioner's claims challenging the constitutionality of death sentences imposed after jury decisions for life imprisonment.)

---

### Summary Of FSC Case Dispositions

### Death Sentences After Jury Life Verdicts

| | | |
|---|---|---|
| AFFIRMED---------- | 9 | (6) |
| REDUCED TO LIFE IMPRISONMENT---------- | 19 | |
| REVERSED AND REMANDED FOR RECONSIDERATION BY TRIAL JUDGE---- | 2 | (2) |
| CONVICTION REVERSED, DEFENDANT PLED GUILTY AND RECEIVED LIFE SENTENCE ON RETRIAL---------- | 1 | |
| FIRST REVIEW OF DEATH SENTENCE NOW PENDING---------- | 28 | (28) |
| SUICIDE OR POSSIBLE SUICIDE, FIRST REVIEW MOOTED---------- | 2 | |
| TOTAL NUMBER OF CASES | 61 | (36) |

(Numbers in parenthesis ( ) show persons potentially affected by Petitioner's constitutional claims, including 34 persons presently under sentence of death, and two persons whose death sentences have been remanded for reconsideration by the trial court.)

THIS DATA IS COMPILED AS OF APRIL 15, 1981

# APPENDIX G

## 1. Jury Life Verdict Binding

| | | |
|---|---|---|
| ARKANSAS | Crim. Code (1977) §41-1301-1302 | L |
| CALIFORNIA | Penal Code (1979) §190.3-190.4 | U |
| COLORADO | Rev. Stats. (1973) §16-11-103*@ | L |
| CONNECTICUT | Gen. Stats. Ann. (1979 Pck.Pt.) §53a-46a | U (?) |
| DELAWARE | Code Ann. (1977 Cum.Supp.) §11-4209 | L |
| GEORGIA | Code Ann. (1977) §26-3102, §27-2302 | L |
| ILLINOIS | Ann. Stats. (1979) §38-9-1 | L |
| KENTUCKY | Rev. Stats. (1973 Cum.Supp.) §532.025f | U (?) |
| LOUISIANA | Code of Crim. Proc. (Pck.Pt. 1979) Art. 905.8 | L |
| MARYLAND | Ann. Code. (1978 Cum.Supp.) Art. 27, §413 | L |
| MASSACHUSETTS | 1979 Chapter 488, Section 55 | L |
| MISSISSIPPI | Code (1978 Cum.Supp.) §99-19-101 | L |
| MISSOURI | Crim. Code (1979 Spec. Pamph.) §565.006 | L |
| NEVADA | Rev. Stats.(1977) §175.554 | U |
| NEW HAMPSHIRE | Rev. Stats. Ann. (1977 Supp.) §630.5 | L |
| NEW MEXICO | Stats. Ann. (1979 Supp.) 31-20A-3 | L |
| NORTH CAROLINA | Gen. Stats. (1978) §15A-2000 | L |
| OKLAHOMA | Stats. Ann. (1978-1979 Pck.Pt.) §21-701.11 | L |
| PENNSYLVANIA | Act No. 1978-141: §18-1311 | L |
| SOUTH CAROLINA | Code Ann. (1973 Cum.Supp.) §16-3-20 | L |
| SOUTH DAKOTA | State Laws 1979 Chapter 160: §23A-27A-4 | L (?) |
| TENNESSEE | Code Ann. (1973 Cum. Supp.) §39-2404 | L |
| TEXAS | Code Crim. Proc. Art. 37.071 | T |
| UTAH | Crim. Code (1978) §76-3-207 | L |
| VIRGINIA | Code (1979 Cum.Supp.) §19.2-264.4 | L |
| WASHINGTON | Rev. Code Ann. (1978 Pck.Pt.) §10.94.020 | U (?) |
| WYOMING | Stats. (1977) §6-4-102 | L |
| UNITED STATES | 49 USC §1473 (1976) (Antihijacking Act) | U |

## 2. Jury Life Verdict Not Binding

| | | |
|---|---|---|
| FLORIDA | Stats. Ann. (1977) §921.141 | M |
| INDIANA | Stats. Ann. (1979) §35-50-2-9 | U |

## 3. Judge Sentences After Jury Finding Of Aggravation

| | | |
|---|---|---|
| ALABAMA | Code (1975) §13A-5-33 | |
| OHIO | Rev. Code Ann. (1975) §2929.03* | |

## 4. Penalty Determination By Judge Alone

| | |
|---|---|
| ARIZONA | Rev. Stats. Ann. (1973 Supp.Pamph.) §13-454 |
| IDAHO | Code (1978 Cum,Pck.Supp.) §19-2515 |
| MONTANA | Rev. Codes (1977 Interim Supp.) §95-2206.6 |
| NEBRASKA | Rev. Stats. (1975) §29-2520 |
| OREGON | 1978 Referendum Measure--Codification Not Yet Received |

## LEGENDS AND NOTATIONS

L---Life sentence unless jury unanimously agrees on death
U---Unanimous verdict required for either life or death
M---Majority suffices for verdict of either life or death
T---Unique Texas procedure--penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim. 12 jurors required to answer each question "yes"; 10 jurors may answer any question "no" and prevent death penalty.

*Colorado and Ohio statutes found unconstitution because mitigating circumstances limited--see Lockett v. Ohio, 438 U.S. 586 (1978).

fKentucky statute generally understood to make life verdict binding, although language not absolutely clear.

(?) The Kentucky, Connecticut and South Dakota statutes do not specifically state a unanimity requirement on penalty, but it is fairly assumed; the Washington statute does not specify the consequences if the jury fails to agree on the penalty issue.

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@Colorado in August of 1979 amended its statute to comply with Lockett by allowing unlimited consideration of mitigation; see Rev. Stats. (1979 Cum.Supp.), Section 16-11-103.

*Ohio and Colorado statutes found unconstitutional because mitigating circumstances limited--see Lockett v. Ohio, 438 U.S. 586 (1978). Colorado in August of 1979 amended its statute to comply with Lockett by allowing unlimited consideration of mitigation; see Rev. Stats. (1979 Cum.Supp.), Section 16-11-103.

#The Kentucky statute is not absolutely clear in its language concerning the finality of a jury decision against death, but in Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) the Supreme Court of Kentucky construed the statute to require a jury finding of at least one aggravating circumstance in the penalty phase before the judge may consider imposing the death penalty. Since the statute calls for written findings of aggravating circumstances by the jury only "if its verdict be a recommendation of death," see Kentucky Rev. Stats. (1978 Cum.Supp.) Section 532.025 (3), it appears that a jury life decision is in effect binding under the Kentucky scheme.

@Alabama statute declared unconstitutional in Beck v. Alabama, ___U.S. ___, 100 S. Ct. 2382 (1980), because of prohibition of lesser offense instructions in capital cases under that statute.

**Oregon death penalty statute declared unconstitutional by Supreme Court of Oregon in State v. Quinn, 623 P.2d 630 (Or. 1981) on ground that making "deliberateness" of capital murder a fact to be determined by the trial judge alone in the penalty phase denied an accused the right to trial by jury.

(?) The Kentucky statute as interpreted by the Supreme Court of Kentucky requires a unanimous jury verdict for death, but the consequences of a jury's inability to agree on the penalty issue are not defined. The Connecticut and South Dakota statutes do not specifically state a unanimity requirement on penalty, but it is fairly assumed; the Washington statute does not specify the result if the jury fails to agree on the penalty issue.

## Overall Categories

| | |
|---|---|
| JURY LIFE VERDICT BINDING | 28 |
| JURY LIFE VERDICT NOT BINDING | 2 |
| JUDGE SENTENCES AFTER JURY FINDING OF AGGRAVATION | 2 |
| JUDGE DETERMINES PENALTY ALONE | 5 |
| TOTAL JURISDICTIONS | 37 |

## Jury Participates In Determining Aggravation

| | |
|---|---|
| YES | 32 |
| NO | 5 |
| TOTAL JURISDICTIONS | 37 |
| RESULT IN FAVOR OF DEFENDANT BINDING | 30 |
| RESULT IN FAVOR OF DEFENDANT NOT BINDING | 2 |
| SUBTOTAL OF JURISDICTIONS | 32 |

## Jury Participates In Actual Sentence Decision

| | |
|---|---|
| YES | 30 |
| NO | 7 |
| TOTAL JURISDICTIONS | 37 |
| RESULT IN FAVOR OF DEFENDANT BINDING | 28 |
| RESULT IN FAVOR OF DEFENDANT NOT BINDING | 2 |
| SUBTOTAL OF JURISDICTIONS | 30 |

METHOD OF STUDY: For each jurisdiction restoring a discretionary death penalty since Furman v. Georgia, 408 U.S. 238 (1972), an attempt was made to find the latest statute. Since the purpose here is to survey the "evolving standards of decency" as reflected by the norm of national legislative action, a few statutes such as those of Colorado and Ohio are included which have been declared or may be declared unconstitutional because they do not permit the full consideration of all mitigating circumstances which the defendant may present at the penalty proceedings.

## Rules On Jury Penalty Vote

| | |
|---|---|
| LIFE UNLESS UNANIMOUS FOR DEATH (L) | 21 |
| UNANIMITY FOR ANY VERDICT REQUIRED (U) | 7* |
| MAJORITY SUFFICES FOR LIFE OR DEATH (M) | 1* |
| TEXAS PROCEDURE--SPECIAL PENALTY QUESTIONS | 1 |
| SUBTOTAL OF JURISDICTIONS | 30 |

* (U) includes Indiana (life not binding); (M) includes Florida (life not binding). The majority rule in Florida is not specifically connected with the nonbinding nature of the verdict as the statute is now construed, since from 1872 to 1972 the same majority rule applied but the verdict was final.

THIS SURVEY IS BASED ON INFORMATION AVAILABLE TO APRIL 15, 1981.



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# APPENDIX H

UTAH EXECUTIONS AND DEATH SENTENCES--JURY RECOMMENDATIONS (1948-1972)

Previous to the decision of Furman v. Georgia, 408 U.S. 238 (1972), the State of Utah had a death penalty statute which made the ultimate penalty mandatory unless the jury recommended mercy, and in cases where the jury did recommend mercy extended discretion to the trial judge to impose a penalty of death or of life imprisonment. It may be noted that under Utah law death was the normal penalty for first degree murder, and life imprisonment the exception which thus required agreement by both judge and jury.

There follows a list of every defendant whose death sentence was executed in Utah between 1948 and 1967 (when a moratorium on executions began which was to last nationwide for 10 years while federal constitutional questions were being resolved).

Also, there are listed reports of two Utah cases (in 1941 and 1951) where a death sentence was sustained by the Utah Supreme Court after a jury recommendation of mercy, but was not carried out.

The records show that at least since 1948, there were no executions in Utah after jury recommendations of mercy.

DEFENDANTS EXECUTED IN UTAH: 1948-1967

| Name | Date of verdict | Dist. Ct. # | Appel. Rpt. |
|---|---|---|---|
| 1. Mares, Elisio J. Executed 9/10/51 | March 7, 1947 | Summit Cnty. 3rd Dist. Ct. #420 | State v. Mares, 192 P.2d 861 (Ut. 1948) |
| 2. Gardner, Ray Dempsey Executed 9-29-51 | Dec. 13, 1949 | Weber Cnty. 2nd Dist. Ct. #4803 | State v. Gardner, 230 P.2d 559 (Ut. 1951) |
| 3. Neal, Don Jesse Executed 7/1/55 | ---------- | ---------- | State v. Neal, 262 P.2d 756, 759 (Ut. 1953) Utah S. Ct. noted lack of jury mercy recommendation id. at 759. |

| Name | Verdict Date | Dist. Ct. # | Appel. Rpt. |
|---|---|---|---|
| 4. Braasch, Vern A. Executed 5/11/56 | Dec. 9, 1949 | Iron Cnty. 5th Dist. Ct. #171 | State v. Braasch, 229 P.2d 289 (Ut. 1951) |
| 5. Sullivan, Melvin L. Executed 5/11/56 | Dec. 9, 1949 | Same as Braasch (co-defendant) | Sub nomine Braasch |
| 6. Kirkham, Barton K. Executed 6/7/58 | ---------- | ---------- | State v. Kirkham, 319 P.2d 859, 862 (Ut. 1958). Absence of jury mercy recommendation noted in opinion, id. at 862. |
| 7. Rodgers, James W. Executed 3/30/60 | Dec. 14, 1957 | San Juan Cnty. 7th Dist. Ct. Crim. #243 | State v. Rodgers, 329 P.2d 1075 (Ut. 1958) |

NOTE: In two cases, those of Neal and Kirkham, the opinion of the Utah Supreme Court itself mentions the choice of the jury for a verdict of first degree murder without rather than with a recommendation of mercy; thus only the appellate citation is given for these cases. Information on the other five cases was obtained from the relevant Judicial District Courts of Utah, where the defendants were tried. In each of these cases, trial records revealed a jury verdict of first degree murder without recommendation for mercy. This is especially striking because customarily Utah juries were provided with separate verdict forms for each possible decision, including guilty of first degree murder with a recommendation for life imprisonment.

DEFENDANTS WITH DEATH SENTENCES AFFIRMED IN UTAH AFTER LIFE RECOMMENDATIONS WHO WERE NEVERTHELESS NOT EXECUTED (THIS LIST IS NOT NECESSARILY EXHAUSTIVE, ALTHOUGH THERE IS NO SPECIFIC INDICATION THAT OTHER CASES EXIST).

| Name | Appellate Opinion Aff'g Sentence | Date Commuted |
|---|---|---|
| 1. Markham, John | State v. Markham, 112 P.2d 496, see 496-497 (Ut. 1941). | September 22, 1941 |
| 2. Matteri, Fred | State v. Matteri, 225 P.2d 325, see 329-330 (Ut. 1950). | June 11, 1951 |

NOTE: Commutation dates based on records of Utah State Prison in case of Fred Matteri, and on a document in the Utah State Archives reporting the granting of executive clemency to John Markham: Memorandum, Office of the Attorney General (September 24, 1941) (statement of actions taken by Board of Pardons in meeting of September 20-22, 1941), p. 1, Paragraph 5, Case No. 7083. The records of Utah State Prison also confirm the accuracy and completeness of the above list of Utah executions 1948-1972, which is also available in Bowers, Executions in America 385 (1974).

# APPENDIX I

IN THE SUPREME COURT OF THE

STATE OF FLORIDA

FILED

CASE NUMBER: 45,894 DEC 2 1980

SID J. WHITE
CLERK SUPREME COURT
By _____
Chief Deputy Clerk

JAMES CURTIS MCCRAY, :

Appellant, :

vs :

STATE OF FLORIDA, :

Appellee. :

_____ :

MOTION FOR RE-HEARING

COMES NOW the Defendant/Appellant, pursuant to Rule 9.330 of the Florida Appellate Rules and moves this Court for entry of an Order granting a Re-Hearing with Oral Argument and as grounds shows unto the Court that:

Defendant/Appellant was convicted of first degree murder and sentenced to be executed in the electric chair. Pursuant to Florida Statute §924.08(1973), direct appeal to the Supreme Court was taken. Appellant's initial brief was filed in the Court on or about October 21, 1974. Oral argument was had before the Court on or about March 5, 1975. By order of the Court, further oral argument was had on September 20, 1977. By per curiam opinion dated October 30, 1980, this Court affirmed the judgment of conviction and sentence.

The Defendant/Appellant respectfully submits that the opinion of the Court is erroneous in the following matters and respects:

I. WITH RESPECT TO THE FIRST POINT RAISED ON APPEAL, THIS COURT HAS MISCONSTRUED THE MOTIVES AND EFFECT OF MCCRAY'S DIRECT EXAMINATION BY HIS ATTORNEY.

This Court agreed that the State must limit itself to questions no broader in scope than those propounded by the defense when the Defendant is being cross-examined. McCray v. State, Case Number 45,894, page 7. However, this Court stated the questions to Defendant's counsel "tactfully attempted to mislead the jury into believing that Appellant's prior felony was inconsequential". There is no logical reason to infer this intent from the questions asked; nor to infer this interpretation



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by the jury. The questions of Defendant's counsel elicited the information that Defendant had been convicted of 9 or 10 misdeameanors in which he paid fines and did not go to jail; that Defendant had been convicted of 1 felony; and that Defendant had pled guilty to all of these charges because he was guilty.

The last two questions quoted by the Court reveal the motives and strategy of Defendant's counsel. Defendant's counsel was, by this line of questioning, suggesting to the jury that Defendant's honesty and candor concerning his guilt or innocence in the past was reason for them to believe that he was likewise being honest in denying his guilt of the charges in the instant case. The statements by this Court that "this line of questioning could have deluded the jury..." is not supported by a reasonable reading of the testimony. There were no "delusive innuendoes of his counsel". The statement by the Court to this effect is an outrage!

The Court's citation to Jones on Evidence is inappropriate. The quoted text in Jones, states the "whole truth" or "rest of" rule which permits a cross-examiner to present evidence of the context and thereby overcome a potentially misleading but true statement. The Court's interpretation that the first testimony required context so as not to be misleading strains logic and belies reason. The Court has improperly balanced the right of the State to tell the "rest of" or "whole truth" against the Defendants fundamental constitutional right to a fair trial without introduction of evidence of prior convictions. The Court's opinion stands for the proposition that this fundamental constitutional right is outweighed by the evidentiary right of the State to present evidence which sheds no light on the facts of this case. The only effect of this evidence is to discredit the Defendant. The trial Court erred in admitting this evidence over defense objections. This Court should reconsider its conclusions in light of this analysis.

II. WITH RESPECT TO THE SECOND POINT RAISED ON APPEAL, THE TESTIMONY OF EDITH VEAL AND MURIAL BERGNER WAS NOT RELEVENT.

The description of the individual seen by these women did not closely resemble Defendant as this Court states. The description of these witnesses identified the Defendant only as a young black male. Although this definition excludes old black males, black females, and non-blacks, the identification does not serve to distinguish the



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Defendant from others with sufficient particularity to make the identification relevent. Thus, it was error to receive this testimony into evidence.

III. WITH RESPECT TO THE SECOND POINT RAISED ON APPEAL, THE TESTIMONY OF FAITH GERTNER AND WILLIAM SMITH WAS NOT RELEVENT.

The Court says, "... allegedly, she (Faith Gertner) established that a common plan or scheme was employed by Appellant to gain admittance to the victims homes." McCray v. State, Case Number 45,894, page 10. There was no evidence produced at trial to show how Defendant allegedly gained entrance into the victims home. Nor was there any evidence other than the testimony of Faith Gertner and William Smith from which an inference could be drawn so as the manner in which the Defendant allegedly gained entrance into the victims home. The opinion of the Court does not address this evidentiary gap which is critical to the relevence of this objectionable testimony. The common elements between an alleged crime and a prior offense must be real and apparent not speculativ or remote; otherwise the jury is not aided by the evidence on the former offense; the only realistic effect is that the Defendant is discredited by prior criminal acts for which he is not on trial. Talley v. State, 36 So.2d 201 (Fla.1948); Williams v. State, 110 So.2d 654 (Fla.1959); Davis v. State, 276 So.2d 846 (Fla.2d Dist.1973).

IV. WITH RESPECT TO THE FIFTH POINT RAISED ON APPEAL, THIS COURT ERRED IN AFFIRMING THE TRIAL COURT'S REJECTION OF THE JURY RECOMMENDATION FOR LIFE IMPRISONMENT.

A. THE TRIAL JUDGE, NOT THE JURY, ACTED OUT OF PASSION OR PREJUDICE.

Although it can be interpreted otherwise, the most fair and reasonable reading of the order of Judge Rose, overruling the life sentence verdict of the jury, yields the conclusion that the Judge acted out of passion or prejudice. The order of the trial judge begins with the comment that the Defendant appeared "extremely nervous and upset" when FBI fingerprint evidence was being received. Later in the Order the Judge remarked that the Defendant "could not explain how his bloody fingerprints and palm prints were found on the wall near the back door of the deceased's apartment or upon books and other items in the residence". These observations are irrelevent to all issues it was



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the Court's duty to decide at the sentencing stage of the proceedings. Rather, the observations made are relevent only to the issue of guilt or innocence. The manner in which these statements appear in the order suggest some bitterness or hostility on the part of the trial judge about the Defendant. Although these remarks could be dismissed as mere surplusage in the order, they should not be. Where a sentence of death is involved, this Court should act upon the reasonable inference that the trial judge may have been prejudiced against the Defendant.

When this Court issued its sua sponte Order to Judge Rose to file an affidavit concerning whether or not he violated the rule of Gardner v. Florida, 428U.S. 908 (1977), the Defendant wrote to the trial judge asking that he answer certain questions which the Defendant felt were relevent to the Courts Gardner inquiry and which also bore upon what the Defendant feels where the judge's feelings of prejudice in this case. A copy of this letter of August 4, 1977 is attached in Appendix A. to this Motion. Judge Rose ignored the request of the Defendant. In fact, he never replied at all to this letter. Accordingly, Defendant obtained and filed an affidavit of the newspaper reporter Bill Sloat, which is also contained in Appendix A . The Defendant maintains that the materials in AppendixA make clear that Judge Rose had strong political feelings about the death penalty when he, acting alone, protested the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972). The Judge's personal belief that it was unlikely that MCCRAY'S sentence would ever be carried out should be interpreted to mean that the entry of this sentence was a statement of protest by the trial judge and an expression of his personal views with respect to the treatment on appeal of capital sentences by higher courts. This view is buttressed by the statement of the judge near the end of his order that he felt a responsibility to protect the security of citizens in their homes This statement in his order and his public statements as well make it clear that the personal feelings and political views of the judge motivated him to overrule the jury's advisory verdict; and that he was not motivated by a consideration of the statutory aggravating and mitigating factors. This state of affairs requires a reversal under Gardner and


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constitutes further evidence that the judge was prejudiced against the Defendant. These matters have been totally overlooked by the Court in its opinion of October 30, 1980.

B. THE TRIAL JUDGE FAILED TO CONSIDER EVIDENCE OF MITIGATING FACTORS IN THE RECORD.

As this Court pointed out, the jury was apparently pursuaded by Dr. Schlit's testimony concerning the Defendant's mental/emotional state. The trial judge, without good reason, rejected this testimony out of hand referring to Dr. Schlit as the "good doctor" and stating that his testimony was not within "any degree of medical certainty" No real basis or reason was given for the trial court's rejection of the psychiatric testimony. The stated lack of certainty of his testimony is not convincing because two other court appointed psychiatrists both made essentially the same diagnosis as Dr. Schlit at the pre-trial hearing on the insanity defense. Any lack of certainty the Court found in Dr. Schlit's testimony was made up for by the corroborating definitive opinions of two other court appointed psychiatrists. See Lockett v. Ohio, 438 U.S. 586 (1978); McGautha v. California, 402 U.S. 183 (1971); Gregg v. Georgia, 428 U.S. 153 (1976); and Proffitt v. Florida, 428 U.S. 242 (1976).

C. BASED UPON THE EVIDENCE, THE APPLICATION OF THE AGGRAVATING AND MITIGATING FACTORS BY THE JURY WAS NOT UNWARRANTED.

In Tedder v. State, 322 So.2d 908 (1975), the Court said:

> "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. at 910.

Application of the aggravating and mitigating circumstances is to be made not by a mechanical tabulation; but instead, by a reasoned judgment of the jury and judge weighing all factors. Hargrave v. State, 366 So.2d 1 (1978).

There were three aggravating factors: Appellants previous conviction of a violent felony; that the crime was committed during the commission of a rape; and that the crime was especially heinous, atrocious and cruel.

There is no factual basis for the conclusion that the crime was committed during the commission of a rape. As this Court points out,


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"the rape occurred either shortly before or immediately following Mrs. Mears' death". McCray v. State, Number 45,894, page 11. There was no evidence presented at trial from which it could be determined when the rape occurred. If the rape occurred after Mrs. Mears' death, it was not a rape at all, since rape cannot occur upon an already murdered victim. The essence of the crime of rape, presupposes a living, unwilling victim. This distinction calls for an interpretation of the words "...was committed while the Defendant was engaged ... in the commission of ..." Florida Statute §921.141(b)(d), which has not heretofore been made by the Court. Defendant submits that this language of the legislature should in this case be narrowly construed and interpreted.

Furthermore, there was insufficient evidence to support the finding that the crime was especially heinous, atrocious and cruel. These terms have been defined to mean extremely, outrageously, and shockingly, wicked, vile and evil, acts of murder designed to inflict a high degree of pain, or performed with utter indifference to or enjoyment of the suffering of others. Dixon v. State, 283 So.2d 1, 9 (1973). The evidence in this case cited by the Court in its opinion at page 11 is that Mrs. Mears was standing or sitting, thrown to the floor, her ribs were crushed, and she died by asphyxiation within 4 minutes. The victim was beaten brutally about the head and chest. Blood was splattered upon the walls and ceiling. Since the Court finds that the victim died of asphyxiation and since there is no evidence from which it can be determined whether the blows to the victims head and chest which apparently splattered blood about the premises, occurred before or after her death, the evidence is inadequate to sustain a finding that the crime was especially heinous, atrocious or cruel. Tedder v. State, supra.

On the other hand, evidence of the mitigating factors is clear unrefuted and supported by other evidence in the record. The Defendant received a general discharge from the Army after having been in a psychiatric ward. His background was violent. Dr. Clarence Schlit, a court appointed psychiatrist, testified that the Defendant is irrational. He has made three suicide attempts and hears voices which are not there. He


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regards this phenomena as normal. According to Dr. Schlit, the Defendant is subject to attacks or spells when under emotional stress that prevent him from exercising the restraints exercised by a normal individual. These characteristics may constitute chronic schizophrenic illness. MCCRAY may have been suffering from extreme mental or emotional distress at the time of the crime according to the doctors' testimony.

Another court appointed psychiatrist, Dr. Mordecai Haber, found that the Defendant had "organic brain syndrom" and epilepsy. These findings were confirmed by an electroencephalogram which showed a paroxysmal condition consistent with the temporal lobe seizure disorder. The doctor reported that the essence of this disorder is an explosive personality. Another psychiatrist, Dr. Thomas Haagland, diagnosed the Defendant as having latent epilepsy. This doctor's diagnosis was confirmed by the EEG. The doctor's stated opinion was that "when under the influence of intoxicants he releases an underlying epileptic furor which erupts into uncontrolled violent behavior".

It should be noted that a relationship between epilepsy and violent crime has been recognized. Excerpts of the Report of the Royal Commission on Capital Punishment documenting this relationship is attached hereto in Appendix B. This report has been cited by the United States Supreme Court in McGautha v. California, 402 U.S. 183 (1971) and Gregg v. Georgia, 428 U.S. 153 (1976).

These undenied, unrefuted facts make this case substantially similar if not identical to Jones v. State, 332 So.2d 615 (1976); where this Court overruled the trial judge and reinstated the advisory verdict of the jury in favor of a life sentence. The majority placed great emphasis upon the sensitivities and discretion of the jurors. The Court showed great respect for the jury's collective feeling that the Defendant should not die in the electric chair. Id at 619. Concurring, Justice Sundberg state

> "It is the genious of the jury system that the jury may act as a temporing influence upon the unbending application of rules of law. It is clear to me that the exercise of such an influence is exactly what occurred in the case at bar. This jury represented the conscience and mores of the community in which the crimes were committed. They concluded that the penalty to be exacted by the community for the Defendant's conduct, in light of all the emotional forces which were operating upon him at the time of commission of the crimes, should be imprisonment for life rather than death." Id at 622.

In another highly analogous case, this Court has found that the aggravating factors of murder during the commission of a rape and an expecially heinous, atrocious or cruel murder did not justify the trial judge's overruling the jurys' life sentence verdict where the only miti-


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gating circumstance was impaired mental capacity. Burch v. State, 343 So. 2d 831 (1977). The opinion of the Court fails to distinguish the instant case from these important decisions. There is no significant or meaningful difference between the facts of the instant case and those of Jones and Burch. Accordingly, the Court should not affirm the rejection of the jurys' advisory verdict.

This Court's ultimate conclusion that the jurys' recommendation "has no reasonable basis under the circumstances of this cause" is not supported by the record. This finding totally ignores the testimony of Dr. Haber and of Dr. Haagland. And, the Court fails to offer any meaningful reason for rejecting the testimony of Dr. Schlit.

V. THE COURT FAILED TO DECIDE THE APPELLANT'S APPEAL FROM THE TRIAL COURT'S DENIAL OF HIS PETITION FOR RELIEF UNDER RULE 3.850.

In late 1977, Defendant discovered that perjured testimony had been used against him during the trial. An affidavit to this effect from Otis Walker, a material witness, was obtained. Plaintiff's Motion for a New Trial was remanded by the Court for an evidentiary hearing before the trial court by order of this Court dated November 29, 1978. Thereafter, proceedings were had in the trial court on a properly filed motion for relief under Rule 3.850 of the Florida Rules of Criminal Procedure. Subsequently, the trial court denied the Petition. Appellant filed a notice of appeal to the Florida Supreme Court. Appellant filed his brief on or about June 13, 1979. The State of Florida filed its reply brief on or about July 9, 1979. No opinion has been handed down by this Court. The statement in the opinion of October 30, 1980 that "although Appellant filed a notice of appeal from that order, he has not informed this Court of the grounds of his attack." McCray v. State, Case Number 45, 894 at page 7, October 31, 1980, suggests that the Court did not receive, has lost or misplaced, or has otherwise overlooked the brief of Appellant containing arguments and authorities in support of his position. Appellant requests that full and fair consideration of these issues properly raised on appeal be had.

VI. THE FAILURE OF THE FLORIDA SUPREME COURT TO DECIDE THIS APPEAL FOR MORE THAN FIVE AND ONE HALF YEARS AFTER THE FILING OF BRIEFS AND ORAL ARGUMENT CONSTITUTES A DENIAL OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, FOURTEENTH AND EIGHT AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The initial brief of Appellant was filed in October of 1974.


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Oral argument in this case was had in March of 1975. No adjudication by this Court was made. On or about August 18, 1978, Appellant filed a motion for determination of his appeal in this Court. By order dated September 7, 1978 the motion was denied without commentary, explanation, or opinion.

The right to appeal a judgment of conviction and sentence is a fundamental due process right guaranteed to every defendant under the Fifth and Fourteenth Amendements of the United States Constitution. Moreover the stated public policy of Florida is that capital appeals should be handled expeditiously. For this reason a direct right of review by the Florida Supreme Court was provided. In addition, the time tables normally applicable to civil and criminal appeals are shortened in capital cases. See Florida Statute 924.08 1973. The unexplained an indefensible delay by this Court of more than five and one half years in deciding the Defendant's appeal is a denial of the Defendant's fundamental constitutional right to a speedy adjudication of his case. Since a capital crime was involved this unreasonable and unjustified delay is even more constitutionally offensive. See Bateh v. State, 101 So.2d 869 (Fla.1st Dist.1958); State v. Buchanan, 149 So.2d 574 (Fla.3rd Dist.1963); Carnley v. Cochran, 118 So.2d 629 (Fla.1960); Wooden v. State, 236 So.2d 137 (Fla.1st Dist.1970); and Dobbert v. State, 375 So.2d 1069 (Fla.1979).

Moreover, the effect of this delay by the Court has produced a practical result of compelling the Defendant to serve a sentence not handed down by the Court. Since his arrest before trial, the Defendant has been incarcerated in the Florida state prison system. He remains so incarcerated at this time. The Defendant has served a jail sentence of almost six years. However, no Court has ever sentenced the Defendant to a term of years in jail. To be sure it is reasonable for the State to place and keep a Defendant in custody for a brief period of time prior to the carrying out of a death sentence. However, where the Defendant remains incarcerated for an extended and an unreasonable period of time due to the failure of the judiciary to carry out its constitutionally and statutorily mandated responsiblities to decide the Defendant's appeal expeditiously, the incarceration which is a result of the delay constitutes a violation of the Eighth Amendment rights of the Defendant.

VII. OVERRULING A JURYS' ADVISORY VERDICT OF LIFE IMPRISONMENT IN FAVOR OF THE DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In Douglas v. State, 373 So.2d 895 (Fla.1979), this Court rejected the defense argument that overruling of the jurys' verdict should be allowed only in cases where the jury has recommended the death sentence and not in cases where the jury has recommended life imprisonment. This Court stated that such a practice would constitute a violation of Furman v. Georgia, 408 U.S. 238 (1972). The point of view that this interpretation would constitute a Furman violation is mistaken. In Gregg v. Georgia, 428 U.S. 153, 203 (1976) the United States Supreme Court upheld the statute which provided for life imprisonment if a single juror dissented from the collective decision to impose the death penalty. The United States Supreme Court had previously upheld the constitutionality of a statute which provided that the jurys' recommendation was binding. Jurek v. Texas, 428 U.S. 262 (1976). See also, Collins v. State, 548 S.W.2d 106 (Ark.1977), cert. denied, 434 U.S. 878 (1977); Smith v. Commonwealth, 248 S.E.2d 135 (Va.1978), cert. denied, 441 U.S. 967 (1979) and People v. Fryerson, 599 P.2d 587 (Cal.1979). Thus, the rationale of Douglas, supra is clearly erroneous.

Under the Eighth and Fourteenth Amendments death penalty practices and procedures must conform to national norms, standards, and values. Roberts v. Louisiana, 428 U.S.325,336 (1976)(mandatory death penalty) Coker v. Georgia, 433 U.S. 584, 593-597 (1977)(death penalty for rape of adult); Beck v. Alabama, ___U.S.___100 S Ct.2382 (1980)(denial of lesser offense instructions in capital trial).

Since Furman v. Georgia 30 jurisdictions have enacted death penalty statutes with jury participation in the penalty phase. Of these, 28 make a jury life determination final; the only exceptions being Florida and Indiana. Appendix C. At no time during the past 30 years have more than three jurisdictions in this country permitted overriding a jury verdict recommending mercy. In 1948, of 41 states with discretionary capital statutes, only New York, Delaware and Utah permitted overruling the jurys' verdict. See Andres v. United States, 333 U.S. 740, 767 (1948). By 1963, New York changed its procedure to empower either a


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judge or a jury to make a binding life decision. See Witherspoon v. Illinois, 391 U.S. 510, 525-527 and N.2-8 (1968)(Douglas J., Concurring). At the present time, only Florida and Indiana allow overriding a jury's verdict recommendations; both Utah and Delaware now make a life sentence mandatory unless all 12 jurors concur in the death sentence. See Appendix B. Moreover in practice, actual execution of the death sentence following a jury recommendation of mercy has been extremely rare, even in jurisdictions authorizing the procedure. Although one New York case affirmed overruling the jurys' verdict, Williams v. New York, 337 U.S. 241 (1949) executive clemency was granted in this case. "Message of the Govenor of New York," November 16, 1949, New York legal document number 10, pages 13-14, (1950) quoted in Michael & Wechsler, Criminal Law And Its Administration, page 55 (1956 supplement).

In Utah, there have been no executions following jury recommendations of mercy. See Appendix C.

This writer is unaware of any case in which the death sentence in Indiana has been carried out after a jury recommendation of mercy.

Since actual application of the death sentence as well as the authority conferred by the various state statutes must also be considered in judging a practice or procedure, Lockett v. Ohio, supra at 624-625 (White, J., Concurring), this Court should grant the motion for re-hearing and determine whether the practice in Florida of allowing overriding of a jurys' advisory verdict is contrary to the national norms and values of the public. If so, application of the death penalty in this case would be a violation of Appellant's rights under the Eighth and Fourteenth Amendments to the Constitution.

WHEREFORE, Appellant respectfully requests a re-hearing in accordance with the argument and authority set forth above. Appellant further requests oral argument before the Court since more than five years have elapsed since this case was briefed and since many new cases have come down which should be argued to the Court.

Respectfully submitted,

LAW OFFICES OF PHILIP M. GERSON, P.A.
2000 South Dixie Highway, Suite 212
Miami, Florida 33133

By _____
PHILIP M. GERSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion for Re-Hearing was mailed this 1st day of December, 1980 to: JIM SMITH, Attorney General and Raymond L. Marky, Asst. Attorney General, Tallahassee, Florida.

LAW OFFICES OF PHILIP M. GERSON, P.A.

By _____
PHILIP M. GERSON



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# APPENDIX J

# REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT REGARDING THE RELEVANCE OF EPILEPSY AS A MITIGATING FACTOR IN DEATH PENALTY DECISIONS (1953).

This material is excerpted from Great Britain, Royal Commission on Capital Punishment, 1949-1953, Report Paragraphs 386-392 (1953).

383. The Crown Agent, in his memorandum, said:

"This doctrine, which is now firmly established, has, in the view of the Criminal Authorities, worked satisfactorily and has the effect of preventing convictions of murder in the technical sense and consequent sentences of death where the prisoners are abnormal from a mental aspect, and tends greatly to the side of mercy."[9]

There was confident testimony in the same sense from practically all legal and medical witnesses in Scotland. There was at one time some apprehension that the doctrine had been pressed too far, but we found general agreement that at the present time it works well and fairly and that juries do not take refuge in it without justification.[1]

## B. Categories of Mental Abnormality

384. We see no need to examine individually all the various forms of mental abnormality that may make it inappropriate to inflict capital punishment. Both in England and in Scotland the Secretary of State, in deciding whether clemency should be recommended, is free to take into consideration any form of abnormality to which a prisoner under sentence of death is subject; in Scotland the jury may take account of any form of abnormality, with the possible exception of psychopathic personality (see paragraph 380 above), in deciding whether the responsibility of an accused person was diminished. In each case the decision will depend on whether the mental abnormality was such that the responsibility of the offender for his crime was substantially diminished; and this is a question of degree, which must be decided on the facts of the particular case.

385. *Mental deficiency.* We have already discussed the question of mental deficiency at some length (paragraphs 335–358) and have expressed the view that, though some mental defectives can properly be held wholly irresponsible, the majority should rather be regarded as having a diminished responsibility. The diminution of responsibility may in borderline cases be relatively small, but it can never be excluded, and in our opinion it would not ever be right to carry out the sentence of death in any case where a prisoner is certifiable as a mental defective. It is indeed undesirable that the sentence of death should even be pronounced in such a case, but in England this cannot under the existing law be avoided, unless the deficiency is so gross as to justify a finding of insanity on arraignment or of guilty but insane.

### Epilepsy and psychopathic personality

386. Two forms of mental abnormality present problems of special difficulty —epilepsy and psychopathic personality.

### (i) *Epilepsy*

The first question here is that of definition. It is necessary to distinguish clearly between epilepsy as a manifestation, that is, some form of epileptic "fit" or attack, and epilepsy as an abnormality or disease. An epileptic attack is a transitory condition in which a part of the brain, or the whole of it, passes into a state of abnormal activity. The abnormal activity is shown in mental and physical (including electrical) changes, which are beyond the control of the will. If a part only of the brain is involved, there may be a muscular movement, a sensation, a hallucination or a change in mood or some mental experience; but there is not usually unconsciousness. If the abnormality affects the whole of the brain, consciousness is clouded and may

9. Gordon, p. 167 (5).
1. Cunningham, Q. 626; Keith, Q. 5193–4; Cooper, Q. 5467; Walker, Q. 5623; Shaw Q. 5877; Bruce, Q. 6064; Henderson, Q. 6998.



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be completely lost. Recent research has shown that quite normal people can be induced to have an epileptic attack if they are subjected to special stimuli. A person who suffers from epilepsy is a person who has a special tendency to have such attacks, and has them in conditions in which normal people would not, so that he needs medical help to keep these tendencies under control. In such cases the occurrence of epileptic attacks may be merely the most obvious sign of underlying defect of the brain or damage to it.

387. The manifestations of epilepsy vary widely in character and it is often difficult to assess the extent to which they can reasonably be regarded as affecting responsibility for a crime. We were informed that the Home Secretary, in considering whether to recommend commutation of the death sentence, would take account of the fact that a prisoner was an epileptic, but only if his epilepsy were related to his crime.[2] In many cases it is by no means easy to determine whether such a relation exists, and we propose to consider whether this criterion, applied by successive Home Secretaries, can be regarded as satisfactory.

388. In some cases the relation between the epilepsy and the crime is close and direct. The clearest example is the case where a crime is committed in a state of automatism or clouded consciousness which follows a major epileptic fit. Another obvious case is where epilepsy is associated with a chronic form of insanity. If a person commits a crime of violence while he is suffering from either of these mental conditions, there can be no doubt that he should be regarded as wholly irresponsible. But such cases are rare.

389. Occasionally a crime may be committed as what is called an "epileptic equivalent". An epileptic equivalent is some kind of experience or behaviour which is not, like a general convulsion, itself of a characteristically epileptic kind, but, though due to the same causes, assumes a different form of abnormality. An attack of motiveless rage, for instance, may in some cases be an epileptic equivalent. As, however, the abnormal state will not have been obviously epileptic, the difficulty will be to establish that it was in fact the "equivalent" of an overt epileptic attack due to the same causes. If there is clinical evidence, perhaps supported by an electro-encephalographic (EEG) examination,[3] that the accused suffers from

J-3

2. Newsam, Q. 67–8.

3. The electro-encephalograph is an instrument which records on moving paper the fluctuations in electrical activity on the surface of the brain from a number of electrodes attached to the scalp. The record so obtained (the electro-encephalogram or EEG) consists of a complex trace of waves of different sizes and frequencies, depending upon the area of the brain examined and the state of the subject at the time of the examination. Characteristic changes occur in all normal persons during sleep, when looking with attention at any object, when relaxed with the eyes closed and when conscious awareness is impaired from any cause. During waking hours, the general characters of the EEG pattern remain constant throughout life from maturity to senility. These characters, however, develop during childhood and change greatly during the years up to the age of about 18. They may also be changed as a result of brain injury or disease.

Standards of normality have been established for EEG patterns, which hold good for 90 per cent of the population. Abnormalities may be of three kinds. They may be specific and indicate that the subject is, for example, epileptic, suffers from a brain tumour or abscess, or has a local area of brain damage from injury or disease. They may be unspecific, but indicate a severe change from normality. Or they may be unspecific and mild. (Specimens of the different types of EEG patterns are illustrated in Margery Fry, *Arms of the Law* (Gollancz, 1951), pp. 222–4). It is generally accepted that a specific epileptic EEG pattern conclusively establishes the existence of epilepsy, but some persons who are clinically known to be epileptic do not show the characteristic EEG abnormality and its absence does not therefore conclusively disprove the presence of epilepsy. (This note is largely based on the evidence of Dr. Denis Hill, pp. 297 ff. Dr. Hill emphasized that the EEG is a laboratory investigation, which should never be used alone, but only as an adjunct to other methods of clinical examination, and that it can never answer the question of responsibility.)

epilepsy, and if he remembers nothing of the crime, or if his memory of it is clouded, and if his actions at the time of the crime show signs of mental confusion, it will be reasonable to infer that the crime was an epileptic equivalent. If, on the other hand, the clinical evidence of epilepsy is ambiguous, or if it can be shown by other evidence that the whole pattern of his actions was clear-sighted and orderly, or that his memory of the episode is complete and extends to details, the evidence that the crime was an epileptic equivalent would be unconvincing. The question whether a crime was an epileptic equivalent must be decided by the appropriate authority, whether this is the jury or the Secretary of State, in the light of all the evidence in each particular case. It will seldom be possible to establish this positively; but we have no doubt that, where it is established, the accused should be treated as wholly exempt from responsibility.

390. There remain the far more numerous cases in which there is some evidence that a person accused of a murder or other crime of violence is an epileptic, although there is no evidence of epileptic insanity, no evidence that the crime was committed in a state of post-epileptic automatism or as an epileptic equivalent, and, in short, no evidence of a direct causal relation between the epilepsy and the crime. In some cases of this kind, although the clinical evidence may be inconclusive, the diagnosis of epilepsy may now, as the result of recent advances, be confirmed by a specific EEG record. Two views may be taken about such cases. Some witnesses accepted the view that, if a person who was shown to be an epileptic committed a murder, the possibility of the epilepsy being an important factor in its causation could never safely be excluded. Others thought that in some cases the epilepsy might have no bearing on the crime, and that it was reasonable to take this view where there was some obvious ordinary motive for the murder, such as financial gain or sexual jealousy; but that, where there seemed to be no clear motive, it was reasonable to infer that the epilepsy might have played a part and to give the prisoner the benefit of the doubt.

391. The difficulties that arise in considering the criminal responsibility of the epileptic are not, in our view, capable at the present time of any general solution. Medical research is very active in this field; and medical concepts which profoundly affect any medico-legal appreciation are changing rapidly. Any general recommendation we could make could have only a very temporary validity. We think that the present state of knowledge justifies no more than the following observations.

392. Although many epileptics may lead normal lives, yet any person who suffers from epilepsy must be assumed to have an abnormality in the function of the brain. There will, therefore, be this reason for doubting whether a crime committed by an epileptic was committed in a normal and not in a pathologically altered state of mind; and there will be a presumption that, even though the criminal act may not have been attributable to the epilepsy itself, the underlying abnormality of the brain may have provided a link in the chain of causation leading to it. Every case will have to be considered on its merits at the trial, and in those that come up for review by the Secretary of State we think that this presumption should weigh heavily with him.

(ii) *Psychopathic personality*

393. We heard much evidence about the difficult problems raised by "psychopaths" or offenders of "psychopathic personality". There is no generally accepted definition of this term, and no consensus of opinion about the scope or the nature of the mental condition which it is intended to

filed July 15, 1981

Case No. 80-6819

In The

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

JAMES CURTIS MC CRAY,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT,

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA


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## QUESTIONS PRESENTED

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF A DEATH SENTENCE CONTRARY TO A JURY PENALTY VERDICT OF LIFE IMPRISONMENT VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Imposition Of Death After A Jury Decision For Life Is Contrary To The Near-Unanimous Consensus Of The States And The Great Weight Of Professional Legal Opinion, Raising Grave Questions Of Constitutionality Under The Sixth, Eighth, and Fourteenth Amendments.

B. Florida's Practice, As Interpreted By The Highest State Court In Petitioner's Case, Is Based On The Mistaken Notion That A Final Jury Decision For Life Would Violate The Federal Constitution Indicating Violation Of The Eighth and Fourteenth Amendments.

C. Florida's Policy Of Overturning Jury Life Decisions Merely In Ordero [sic] Avoid Isolated "Errors" For Mercy Violates The Sixth And Fourteenth Amendment Values Held Applicable To Capital Penalty Juries In Witherspoon v. Illinois, 391 U.S. 510 (1968).

D. The Overturning At The State's Behest Of A Representative Jury's Verdict Against The Death Penalty Based Ontatutory Findings Of Fact Constitutes A Unique Double Jeopardy Situation Under The Fifth And Fourteenth Amendments.

E. Since The Overriding Of A Jury's Verdict For The Accused In A Trial Of Guilt Would Be Not Only Unconstitutional But Shockingly Unfair, Use Of This Procedure In The Penalty Phase Of A Capital Case Should Be Carefully Scrutinized Under The Due Process Clause Of The Fourteenth Amendment.

F. Infliction Of The Extraordinary And Controversial Sanction Of Death By an Unrepresentative State Judiciary, Contrary To The Verdict Of A Jury Of The People, Conflicts With The Scheme Of Limited And Representative Government Implicit In The Eighth And Fourteenth Amendments, And Violates The Principle Of Judicial Restraint.

G. It is A Violation Of The Petitioner's Due Process Rights Under The Fourteenth Amendment To Overrule The Jury's Life Verdict Where The Jury Has Properly And Reasonably Weighed The Aggravating Circumstances Against The Mitigating Circumstances.

H. Overruling The Jury's Life Verdict By A Biased Trial Judge Whose Decision Was Based On Non-Statutory Factors Violates The Due Process Clause Of The Fourteenth Amendment.

II

THE FAILURE OF THE FLORIDA SUPREME COURT TO DECIDE PETITIONERS DIRECT APPEAL FOR MORE THAN FIVE AND ONE HALF YEARS AFTER THE FILING OF BRIEFS AND ORAL ARGUMENT CONSTITUTES A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENT.

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## OPINION BELOW

The opinion of the Supreme Court of Florida is reported as McCRAE v. State, 395 So. 2d 1145 (Fla. 1981).

## JURISDICTIONAL STATEMENT

Respondent accepts Petitioner's assertion that this Court's Jurisdiction is invoked under 28 U.S.C. § 1257 (3). Respondent denies that the issues asserted by petitioner were asserted or decided in any State Court below.

## STATEMENT OF THE CASE

Respondent will accept petitioner's Statement of the Case for the purpose of determining jurisdiction. However, respondent cannot accept and specifically denies the portion thereof which asserts that petitioner raised the questions of the constitutionality of Florida's procedure allowing the overruling of the jury's "sentencing verdict" [recommendation] by the trial court in his main brief. (Appendix A attached hereto)

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Respondent denies petitioner's assertions contained herein.

## REASONS FOR DENYING CERTIORARI

### I

### THE ISSUES RAISED BY PETITIONER HAVE NOT BEEN PROPERLY RAISED, PRESERVED OR PASSED UPON BY THE STATE COURTS BELOW.

In his petition for writ of certiorari, petitioner has raised two main issues, designated "I" and "II" with eight sub issues to main issue "I" designated "IA" through "IH". Petitioner further asserts in his STATEMENT OF THE CASE that he raised these constitutional questions in his main brief. He did not. (Appendix A attached hereto.)

A review of the decision below and the brief of appellant attached hereto as Appendix A reveals that the issues raised by petitioner were neither raised nor decided in the Supreme Court on direct appeal. Petitioner did raise an issue concerning the

constitutionality of the Florida Death Penalty Statute, Section 921.141, but not on the grounds alleged in this petition. All constitutional issues raised by petitioner below were decided adversely to petitioner's assertions in State v. Dixon, 283 So. 2d 1 (Fla. 1973) and Proffitt v. Florida, 428 U.S. 242 (1976). See McCrae v. State, 395 So. 2d 1145 at 1153 (Fla. 1981); Petitioner's "Brief of Appellant," Point IV, attached hereto as Appendix A.

Following the Supreme Court's decision below, petitioner did attempt to raise an Eighth and Fourteenth Amendment violation arising out of the decision of the trial court to overrule the jury recommendation of life and the five and one half year delay in deciding the appeal. (I 7-11 attached to petition). However, not even those issues were properly raised under Florida law and were therefore not considered by the Florida Supreme Court on rehearing. McCrae v. State, 395 So. 2d at 1155-1156 (Fla. 1981).

Florida law clearly states that an appellate court will not consider an issue, even of constitutional dimensions, which are raised for the first time on appeal. Silver v. State, 188 So.2d 300 (Fla. 1966); Whitted v. State, 362 So. 2d 668 (Fla. 1978). Nor is a Motion for Rehearing the proper vehicle for raising an issue which should have been raised, argued and decided in the hearing on the merits of the appeal. Florida Appellate Rule 3.14 (b) (1962 ed.). See e.g. English v. State, 31 Fla. 340,12 So. 689 (1893); Nelson et.al. v. Selden Cypress Door Co., 78 Fla. 203,83 So. 286 (1919); Russo v. State, 142 Fla. 596, 196 So. 293 (1940); Carter v. Fla. Dept. of H. & R. Services, 354 So. 2d 81 (Fla. 1st DCA 1978).

Issues I A-H and II were NOT raised, preserved or passed upon in the State Courts below. It was very early established that this Court will NOT decide federal constitutional issues raised here for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S. 437 (1969). The issues asserted by petitioner should therefore not be considered now.

In any event, there is no constitutional right to jury sentencing in capital cases. See Westbrook v. Lalkcom, ___U.S.___, 66 L. Ed. 2d 298 (1980) [Justice White dissenting from the denial of certiorari.]

II

THE FAILURE OF THE FLORIDA SUPREME COURT TO DECIDE PETITIONER'S DIRECT APPEAL FOR MORE THAN FIVE AND ONE HALF YEARS IS MOOT BY RESOLUTION OF CONTROVERSY, HAS NOT BEEN PROPERLY RAISED IN THE STATE COURTS BELOW, AND DOES NOT PRESENT AN ISSUE TO WHICH A REMEDY EXISTS.

Respondent is aware of no remedy available to petitioner even assuming for argument's sake only that the Eighth and Fourteenth Amendments are in some manner implicated by the five and one half year delay of the Florida Supreme Court in deciding the appeal below. The Federal Constitution does not provide for a Speedy execution of the death penalty.

Without conceding that any such right exists, respondent can imagine an argument being made to the effect that some manner of due process or Sixth Amendment right might be offended by appeal delay if, but only if, the appellate court reverses a conviction for a new trial and the length of delay was intentional by the Court and has caused actual prejudice to the defendant's ability to present a defense on retrial. c.f. United States v. Marion, 404 U.S. 307 (1971); Barker v. Wingo, 407 U.S. 514 (1972).

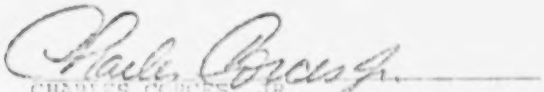
However, in the instant case, petitioner's judgment and sentence were affirmed, thereby resolving the controversy, before he even raised a constitutional issue concerning the delay in his motion for rehearing. By that time, the question came to late. By that time, the issue was moot. Respondent would also point out once again that the issue has not been properly presented to or decided by an state court. The question was improper for consideration on rehearing.

## CONCLUSION

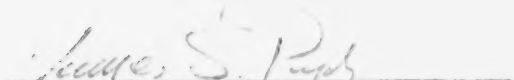
For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL OF FLORIDA



CHARLES CORCES, JR.
Assistant Attorney General



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Counsel for Respondent

## CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Florida, Respondent herein, hereby certify that on July 13, 1981, pursuant to Rule 33, Rules of the Supreme Court of the United States, I served three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari on Phillip M. Gerson, P.A., Attorney for Petitioner herein, by depositing such copies in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to 2000 South Dixie Highway, Suite 212, Miami, Florida 33133.

All parties required to be served have been served.

OF COUNSEL FOR RESPONDENT